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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-855

ALLEGHENY AIRLINES, INC., *Petitioner*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *and its Chairman,* GEORGE I. BLOOM, *and* WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III, *and* LOUIS J. SPARVERO, *Members of the Commission, Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Allegheny Airlines, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on July 21, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 13a) is reported at 465 F.2d 237. The opinion of the United States District Court for the Eastern District of Pennsylvania (App. 1a), entered November 10, 1970, is reported at 319 F.Supp. 407.

JURISDICTION

The judgment of the Court of Appeals (App. 29a) was entered on July 21, 1972. A timely petition for rehearing was denied on September 13, 1972. (App. 31a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

May a federal district court abstain from hearing a case, admittedly within its jurisdiction, where the only question presented is whether the Congress of the United States, by the Federal Aviation Act of 1958, has preempted the power of the states to regulate the schedules and patterns of service of federally certificated and subsidized interstate air carriers?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article VI, provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The pertinent provisions of the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. (App. 33a), and the Public Utility Law of the Commonwealth of Pennsylvania, Act of May 28, 1937, P.L. 1053, art. I, §1 et seq. (App. 34a), are set forth in the Appendix.

STATEMENT OF THE CASE

Allegheny Airlines, Inc.[1] brought this action against the Pennsylvania Public Utility Commission, on September 12, 1969, seeking a judgment declaring that certain of the Commission's orders and rules to show cause, relating to schedules and patterns of service between Pennsylvania cities on Allegheny's federally certificated interstate routes, constituted an unlawful intrusion upon an area of exclusive federal jurisdiction.

The jurisdiction of the district court was invoked pursuant to (a) 28 U.S.C. §1337, in that the action arose under an Act of Congress regulating commerce, namely, the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., and (b) 28 U.S.C. §1331, in that the matter in controversy arose under the Constitution and laws of the United States, specifically Article VI, Clause 2 of the Constitution of the United States and the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. Additionally, it was averred that petitioner and the respondents were citizens of diverse states and that the amount in controversy exceeded the sum or value of $10,000 exclusive of interest and costs.

The offending orders and rules to show cause issued by the Pennsylvania Commission require Allegheny to maintain direct service between each pair of Pennsylvania cities on Allegheny's routes unless authorized by the Pennsylvania Commission to abandon such service.[2] It

1. Allegheny is the largest local service carrier in the United States, having carried over 4.5 million passengers in 1968. Allegheny's route structure as certificated by the CAB, in 1969, covered 17 states, the District of Columbia and Canada, with air service being provided to some 88 cities through a total of 67 airports, only 13 of which were within Pennsylvania. Allegheny has Pennsylvania Commission certificates of convenience to carry passengers between Pennsylvania cities named in its CAB route structure.

2. The context in which Pennsylvania regulation of Allegheny exists is indicated by the fact that the 1968 revenues from intra-Pennsylvania passengers amounted to only 2.32% of Allegheny's total revenue; and of the 4.5 million passengers carried by Allegheny in the same year, only 2.7% were intra-Pennsylvania passengers.

is uncontested that the Civil Aeronautics Board (CAB), the instrumentality of the United States charged with the regulation of routes and patterns of service provided by federally certificated air carriers, does not require such direct service.

The Congress of the United States, by the Federal Aviation Act of 1958, has directed the CAB to promote the development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States. (App. 33a) Besides the regulation of rates and service by these carriers, the Board is also charged with determining the amount of federal subsidy paid annually to each air carrier. The amount of the subsidy paid to Allegheny in the years 1959 through 1968, inclusive, totaled more than $85,000,000.

The CAB, by its counsel, appeared before the district court and advised the court that the Board in certificating service between points within a state, considers the needs of both interstate traffic and local traffic between those points. The Board took the position that Allegheny's interstate operations under its CAB certificate and its operations between points in Pennsylvania under the Commission's certificate were so inextricably intertwined as to preclude any practical or legal separation, and that the Federal Aviation Act had left no room for the type of regulation imposed by the Pennsylvania Commission.

On November 10, 1970 the district court denied Allegheny's motion for summary judgment and granted the Commission's motion to the extent that it requested a dismissal of the action. Despite the district court's recognition (App. 4a) of the nationwide impact of the outcome of this suit on the federal-state roles in the regulation of air commerce, the district court decided to abstain from the exercise of its admitted jurisdiction.

The district court predicated its conclusion that abstention was proper on grounds of federal-state comity and the existence of an unclear question of state law, i.e., whether the Pennsylvania Commission actually had the

authority under state law to issue the orders and rules to show cause involved.[3]

Upon appeal by Allegheny, the United States Court of Appeals for the Third Circuit held that the district court had properly abstained for the purpose of avoiding federal-state friction. In so doing the Court found that Allegheny's position created "a serious possibility of disturbing the orderly state system of agency regulation of transportation within Pennsylvania." (App. 23a)

The Court of Appeals found it unnecessary to decide whether the district court had correctly concluded that there existed an unclear question of state law. It noted, however, that "the PUC's authority to take the measures described above seems clear. 66 P.S. §1122." (App. 22a).

REASONS FOR GRANTING THE WRIT

The district court and the Court of Appeals below have in this case worked a radical extension of the abstention doctrine. In effect, the courts below have abandoned to state courts the power to decide the issue of federal pre-emption in a regulatory field; i.e., whether the Congress intended by legislation to so occupy a field of regulation as to preclude concurrent state regulation. Such a result conflicts with the prior decisions of this Court; and conflicts with a decision of the United States Court of Appeals for the Second Circuit, which has held that abstention is "peculiarly inappropriate" in preemption cases. If permitted to stand, the decision of the courts below will inevitably result in an exacerbation of federal-state conflicts relating to regulatory jurisdiction.

The Circuit Court was apparently led to this astonishing result by an unwarranted deference to state procedures to the exclusion of the federal regulatory system established

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3. This authority was never questioned by the parties.

by Congress. Thus, in response to Allegheny's arguments that PUC jurisdiction over schedules had been preempted, the Court says (App. 24a):

> "The issue, thus, is not, at this stage, whether the airline may or may not discontinue the service in question because federal legislation has preempted the field. The issue is whether a state certificated public utility may arbitrarily ignore the procedural rules of the Commission which require that issues, including jurisdictional issues, be raised before discontinuance of service."

It is respectfully submitted that if Congress has preempted state regulation of scheduling by a federally certificated interstate carrier, the state has no jurisdiction, by procedural rules or otherwise, to restrict Allegheny's scheduling changes. Moreover, the issue is not affected by the fact that the state directs its orders only to Allegheny's state certificated routes, where as here they are inextricably entwined with the federally certificated routes. It is the impossible burden of contending with regulation by many states over service inextricably intertwined with interstate service that brought Allegheny to the federal courts. See *Colorado v. United States*, 271 U.S. 153 (1926).[4]

For the purpose of judging the propriety of abstention in this case, it must be assumed that Congress intended to preempt state regulation of scheduling by a federally certificated air carrier. Under such an assumption, the decisions of the courts below create a dangerous precedent

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4. The Circuit Court decision includes five itemized bases for its decision, each of which reflects this same concern for local regulation of Allegheny's limited Pennsylvania business to the exclusion of the federal regulatory system and the potential injury to Allegheny's interstate passengers and business which is inseparable from the treatment of its local business.

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in the abdication of federal court jurisdiction to settle federal questions.

I. The decisions of the courts below conflict with the decisions of this Court in abstention-preemption cases.

The courts below either ignored or denied the applicability of two controlling decisions by this Court; namely, *Public Utilities Commission of Ohio v. United Fuel Gas Company*, 317 U.S. 456 (1943) and *City of Chicago v. Atchison, Topeka & Santa Fe Railway Company*, 357 U.S. 77 (1958).[5]

In *P.U.C. of Ohio*, United, an interstate gas pipeline company, brought an action to restrain enforcement of the Ohio Commission's order assuming jurisdiction over its rates. United argued that the Federal Power Commission had exclusive jurisdiction over its rates by virtue of the Natural Gas Act of 1938. This Court held that abstention was unwarranted, even though there existed a doubtful question of state law, since the federal question of preemption would still remain after resolution of the state law issue and reference to the state court would only further delay a final determination of the controversy.

City of Chicago involved the validity of an ordinance requiring a certificate of public convenience and necessity for the operation of interterminal vehicle services. The railroad brought an action in the district court alleging that the ordinance, if it applied to their transfer service, was inconsistent with the provisions of the Interstate Commerce Act as well as the Commerce Clause of the Constitution. The district court dismissed the complaint, but the Court affirmed, holding that the case was not a proper one for abstention.

5. Although petitioner urged that they were controlling, the Court of Appeals did not cite or discuss either of these cases.

NTED CLOSE TO EDGE

The district court, in the instant case, distinguished *P.U.C. of Ohio* on the theory that the holding in that case was ascribable to the inordinate delay there involved. (App. 10a) This Court's discussion of the delay, however, was presented in the context of explaining why, even despite the presence of an uncertain question of state law, abstention was improper. There is nothing in that decision to suggest that this Court would even have mentioned the possibility of abstention had not such an unsettled state law question existed.

The district court distinguished *City of Chicago* on the ground that the state courts in the instant case have not as yet determined the extent of the Pennsylvania Commission's authority to regulate air carriers. (App. 11a). Presumably the district court below believed that there had been such a determination by the state courts in *City of Chicago*. But the opinion of this Court clearly demonstrates that the contrary was true. The City argued that the federal court should stay its hand until a state court had authoritatively ruled that the inter-terminal transfer vehicles came within the provisions of the ordinance. This Court rejected that argument (357 U.S. at 84): "We see no ambiguity in the section which calls for interpretation by the state courts. . . . Remission to those courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight."

Both courts below predicated their decisions that abstention was proper in this case on two cases: *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) and *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341 (1951). Neither case is in point.

Burford was a federal action by Sun Oil attacking the validity of an order by the Texas Railroad Commission granting Burford a permit to drill four oil wells. Sun Oil contended that the order denied it due process of law. This Court noted that, due to geologic facts, an oil field had to

be regulated as a unit for conservation purposes and that the federal government had chosen to leave "the principal regulatory responsibility" to the states. (at 319) This Court pointed out that the State of Texas had a vital interest in the proper regulation and conservation of Texas oil fields and that its Commission had acquired a specialized knowledge regarding such regulation. The Court also stated that the case "raised a number of problems of no general significance on which a federal court can only try to ascertain state law." (at 331) Finally, the Court held that the regulation of oil prorationing programs "so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." (at 332)

Alabama Public Service Commission v. Southern Railway Company involved an application by the railroad to the Alabama Commission for permission to discontinue two intrastate trains on economic grounds. After hearing, the Commission denied permission. The railroad then brought an action in the federal court, alleging that the order denying permission constituted a deprivation of property without due process of law. This Court held that abstention was proper since the problem of balancing public necessity and any loss to the railroad on the two trains was essentially a local problem.

It is readily apparent that *Burford* and *Alabama Public Service Commission*, where abstention was found proper, have common characteristics which distinguish them from *P.U.C. of Ohio* and *City of Chicago*. First, no conflict of federal and state regulatory authority was presented in *Burford* and *Alabama P.S.C.*; a clear conflict existed in *P.U.C. of Ohio* and *City of Chicago*. Secondly, the only federal question presented in the first two cases was the relatively amorphous due process claim; in the latter two a federal issue of congressional preemption was involved. Thirdly, the first two cases involved situations where the federal government's interest in the subject matter (two trains

between points within Alabama, and Texas oil fields) was remote and minimal in comparison with the immediacy and importance of the states' interest; whereas, in the second two cases the federal interest in protecting the integrity and coherence of federal regulatory plans for interstate commerce from unwarranted interference by the states was vital and paramount.

The controversy here presented, between Allegheny Airlines and the Pennsylvania Commission, fits the *P.U.C. of Ohio* and *City of Chicago* mold precisely. First, there is a direct conflict in federal and state regulatory authority. Second, a federal preemption question is involved; namely, whether Congress intended to vest principal responsibility for the regulation of air commerce in the Civil Aeronautics Board. Finally, the federal interest here is the protection of the regulatory scheme embodied in the Federal Aviation Act from interference by the Pennsylvania Commission. In addition, the federal government has a pecuniary interest in preventing the drain on the United States Treasury which will be caused by Allegheny's increased subsidy needs arising from the Commission's interference. It is also fair to say that the CAB has had far more experience with the effect of local schedules on interstate air travel than has the Pennsylvania Commission. Moreover, Pennsylvania has no unique or special interest in air travel between Pennsylvania cities on Allegheny's interstate routes which would override the CAB's interest on behalf of interstate passengers. There is therefore no ~~case, 447 F.2d 1143 (9th Cir. 1971), aff'd 405 U.S. 1035 (1972) court.~~ BASIS IN Federal-State comity FOR ABSTENTION IN THIS CASE.

II. The decision of the Court of Appeals for the Third Circuit herein conflicts with the holding of the Second Circuit that abstention is "peculiarly inappropriate" in preemption cases.

The propriety of abstention in a preemption situation was examined in *Chemical Specialties Manufacturers Asso-*

ciation, Inc. v. Lowery, 452 F.2d 431 (2d Cir. 1971). In that case the plaintiff organization of manufacturers brought an action for declaratory and injunctive relief against New York City and its Fire Commissioner contending that city regulations relating to the packaging of hazardous substances constituted an impermissible invasion of a regulatory area preempted by the Federal Hazardous Substances Act, 15 U.S.C. §1261 et seq. The district court concluded that it should abstain from exercising jurisdiction and leave the plaintiff and its members to the appropriate and competent state courts, in which they might assert all legal defenses available to them.

Judge Friendly, for the court of appeals, reversed (at 433):

> We cannot accept the district court's suggestion that this is an appropriate case for invoking the doctrine of abstention. The Supreme Court has recently observed that the "abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe." *Wisconsin v. Constantineau*, 400 U.S. 433, 438, 91 S.Ct. 507, 511, 27 L.Ed. 2d 515 (1971) (citation omitted). Here there is no uncertainty with respect to the City Regulations that would call for construction by the state courts in the first instance. As will be seen, such difficulties in statutory construction as exist pertain rather to the relevant federal laws, and a federal court is better equipped to deal with these. *Indeed, abstention is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction . . . (Emphasis supplied)*

Judge Oakes, who dissented from the court of appeals' result in *Chemical Specialties*, agreed with Judge Friendly on the abstention issue (at 440): "Nor, in view of the claim of federal preemption, is this a case where abstention might be proper . . .".

In this case there is no uncertainty about the Pennsylvania Commission's statutory authority to regulate intrastate air carriage. The only possible issue is whether that jurisdiction has been preempted by the Federal Aviation Act. A federal court should not abstain from deciding that issue.[6]

The conflict between the decision of the Third Circuit in this case and the decision of the Second Circuit in *Chemical Specialties* should be resolved by this Court. Failure to do so will add to the difficulty and complexity attendant on the resolution of federal-state controversies and will cause unnecessary delay in their resolution.

III. Abstention by the federal courts in preemption cases will not avoid federal-state conflicts, but rather will prolong and exacerbate them.

The essence of the abstention doctrine is clear: federal courts, for reasons of federal-state comity, should avoid needless conflict with state agencies. But in a preemption situation there is no question of avoiding the federal-state conflict. That conflict already exists by virtue of the conflicting federal and state regulation.

The only question presented in a preemption situation is where and when the federal-state conflict will be resolved. The choice is between an early resolution in the

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6. See *Northern States Power Company v. The State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972) wherein an electric utility company brought an action against the Minnesota Pollution Control Agency for a judgment declaring that the Atomic Energy Commission's authority to regulate radioactive releases by nuclear power plants was exclusive so as to preclude state regulation. The district court entered the declaratory judgment for the plaintiff, and the Eighth Circuit and this Court affirmed. The abstention issue was not discussed. Apparently it did not occur to either the parties or the courts that the question of federal preemption should be left, in the first instance, to the Minnesota state courts.

federal court and a delayed resolution in the state court. Since the issue relates to the interpretation of a federal statute and the intent of Congress in enacting it, the federal court is certainly the logical forum.

Precisely this rationale was adopted by this Court in *Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501 (1954). There the Board sought to restrain the enforcement by a union of a state court injunction on the grounds that the Board had been vested with exclusive jurisdiction over the subject matter of the dispute there involved. The Court held (at 504-05):

> In absence of a command of the Congress to the contrary, the power of the District Court to issue the injunction is clear. Federal courts seek to avoid needless conflict with state agencies and withhold relief by way of injunction where state remedies are available and adequate. See *Alabama Commission v. Southern R. Co.*, 341 U.S. 341. But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities Commission v. Gas Co.*, 317 U.S. 456, 468-470; *Bowles v. Willingham*, 321 U.S. 503, 510-511.

The fact that the plaintiff in *Capital Service* was a federal agency is not a significant distinction, as is clearly evidenced by this Court's citation of *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) wherein the plaintiff was a private party.

The price of abstention, as Professor Wright has noted, is not cheap. Wright, *Federal Courts* §52 (2d ed. 1970). "Abstention certainly involves duplication of effort and expense and an attendant delay." *Reetz v. Bozanich*, 397 U.S. 82, 86 (1970).

Allegheny Airlines does not question the wisdom of requiring federal courts to refrain from injecting federal power into a dispute between a state and a private party, where the federal government otherwise has no interest in the dispute. But where, as here, the federal interest in the controversy is not only real, but acute, and the conflict between federal and state power already exists, abstention is not only wholly unwarranted but will actually exacerbate federal-state relations by postponing resolution of the existing federal-state conflict.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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ALLEGHENY AIRLINES, INC.

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *and its Chairman, George I. Bloom, and William F. O'Hara, James McGirr Kelly, Daniel Huyett, III, and Louis J. Sparvero, Members of the Commission, Defendants.*

Civ. A. No. 69-2148

United States District Court,
E. D. Pennsylvania.

Nov. 10, 1970.

As Amended Nov. 18, 1970.

OPINION

LUONGO, District Judge.

This is a suit by Allegheny Airlines, Inc. (Allegheny) to have declared null and void certain actions against it by the Pennsylvania Public Utilities Commission (PUC), and to enjoin permanently the PUC and its individual members from proceeding further against Allegheny or its employees for violations of the laws of the Commonwealth of Pennsylvania.

The matter is before the court on cross motions for summary judgment filed by Allegheny and PUC. All the facts have been stipulated. They will be adverted to in the course of this opinion only to the extent deemed necessary to an understanding of the discussion of the legal issues.

I. *Factual Background*

Allegheny was originally certificated by the PUC in 1941 to transport property by air in intrastate commerce within Pennsylvania pursuant to the Pennsylvania "Public Utilities Law," 66 P.S. §1101, et seq. In January, 1949 Allegheny received a certificate from the Civil Aeronautics Board (CAB), the federal regulatory agency established under the Federal Aviation Act, 49 U.S.C. §1301 et seq., to provide interstate passenger service over a route structure covering the District of Columbia and seven states, including Pennsylvania. In March, 1949 the PUC approved Allegheny's application to transport *persons* and property by air in intrastate commerce within Pennsylvania. The intrastate routes authorized by the PUC paralleled Allegheny's interstate routes within the boundaries of Pennsylvania.

Under its CAB certificate, Allegheny is a "local service" carrier, i. e., one which provides service between smaller cities, linking them with larger ones where connections can be made with the "trunk line" carriers (e. g., American Airlines, United Air Lines) which primarily provide long haul service between larger cities. Allegheny is now the largest "local service" carrier in the United States, with an interstate route structure covering seventeen states, the District of Columbia and parts of Canada. Allegheny has intrastate rights in nine of those states, including Pennsylvania. For the fiscal year ending September 30, 1969 its gross revenues aggregated almost $113,000,000, including a federal subsidy[1] of approximately $3,000,000. A little more than 2% of Allegheny's 1969 revenues were generated by intrastate traffic within Pennsylvania.

1. The federal subsidy received by a local service carrier is determined by the need of a carrier for funds to make up operating deficits from unprofitable local, short-haul routes. In order for a carrier to be eligible for a federal subsidy, it must prove to the satisfaction of the CAB that the expenditures were those that any efficient and honest management would make. 49 U.S.C. §1376.

For the efficient operation of its interstate routes, Allegheny makes frequent changes in its patterns of service and schedules. Under federal law, Allegheny is permitted to make such changes without interference from the CAB so long as it provides adequate service. 49 U.S.C. §§1371(e)(4), 1374(a). See Capital Airlines, Inc. v. Civil Aeronautics Bd., 108 U.S.App.D.C. 215, 281 F.2d 48 (1960). The CAB does not require Allegheny to maintain direct plane service between intermediate points on its interstate routes, it being sufficient if Allegheny services each intermediate point on such routes by two round trips in each direction each day, regardless of point of origin or destination.

In 1963 Allegheny discontinued single plane direct service on the 71-mile Williamsport-Harrisburg segment of its PUC intrastate route No. 5. Since that time it has discontinued furnishing single plane direct service between some other pairs of points on its six intrastate routes[2] authorized by the PUC. It has also been furnishing service between some intrastate points not specified in its PUC certificate. The PUC has taken the position that its certificate requires Allegheny to maintain single plane direct service between all pairs of points on authorized intrastate routes in Pennsylvania, and that Allegheny may not provide intrastate service between points within Pennsylvania not specified in the PUC certificate.

After attempts to resolve the matter amicably the PUC

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2. Allegheny's present intrastate route structure is as follows:

(1) Between Pittsburgh and Bradford.

(2) Between Pittsburgh and Philadelphia via Johnstown, Altoona, Harrisburg, Lancaster, and Reading.

(3) Between Pittsburgh and Stroudsburg/East Stroudsburg via Johnstown, Altoona, Bellefonte/State College, Lock Haven, Williamsport and Scranton/Wilkes-Barre.

(4) Between Harrisburg and Scranton/Wilkes-Barre.

(5) Between Erie and Harrisburg via Bradford and Williamsport.

(6) Between Pittsburgh and Allentown/Bethlehem/Easton, via Johnstown, Altoona, Bellefonte/State College, Williamsport, Harrisburg and Scranton/Wilkes-Barre.

issued rules (at different times) on Allegheny to show cause why its state certificate should not be cancelled or other penalties imposed (a) for abandoning direct plane service between Williamsport and Harrisburg; (b) for abandoning direct plane service between other pairs of points on its intrastate routes; and (c) for furnishing intrastate service not authorized by the PUC. At the hearing on the rule to show cause on the abandonment of Williamsport-Harrisburg direct service[3] Allegheny declined to present evidence and answered only that the PUC lacked jurisdiction over routes, flight frequency and schedules of intrastate carriage of persons and property where that service is part of a federally certificated route operated by a federally certificated interstate carrier operating under the rules and regulations of the CAB.

On June 23, 1969 the PUC entered an order making the rule absolute, imposing a fine of $5000 on Allegheny and directing Allegheny to reinstitute direct service between Williamsport and Harrisburg within thirty days or file a petition with the PUC to abandon such service. After the time for filing an appeal from the PUC order to the state courts had passed, Allegheny instituted the instant suit to enjoin the PUC and the individual members thereof from taking any actions against Allegheny or its officers based upon changes in patterns of service or frequency or scheduling of service.

Because of the nationwide impact of the outcome of this suit on the federal-state roles in the economic regulation of air commerce, both the CAB and the National Association of Regulatory Utility Commissioners (NARUC) sought, and were granted, leave to file briefs *amicus curiae*. The CAB also participated in oral argument. The CAB supported Allegheny's contentions on the merits but took "no position with respect to procedural issues or questions of judicial jurisdiction." (CAB's brief, page 6). NARUC's

3. The rule to show cause on items (b) and (c) has been stayed by the PUC pending the outcome of these proceedings.

brief supports the PUC both on the merits and, in particular, in attacking the propriety of federal intervention in the absence of exhaustion of state processes.

II. *Jurisdiction*

It is Allegheny's position in the instant suit that the PUC's attempt to exercise control over it is invalid as a matter of federal law because (a) the field of economic regulation of interstate air carriers, at least insofar as patterns of service and scheduling are concerned, has been preempted by the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., particularly §§1302[4] and 1371(e)(4)[5] of the Act; (b) the PUC orders conflict with Allegheny's rights and obligations under its CAB certificate of public

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4. 49 U.S.C. §1302 reads, in pertinent part, as follows:

"In the exercise and performance of its powers and duties * * *, the Board shall consider the following * * * as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate economical, and efficient service by air carriers at reasonable charges * * *;

* * * * *

(f) The promotion, encouragement, and development of civil aeronautics."

5. 49 U.S.C. §1371(e)(4) reads, in pertinent part, as follows:

"No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. * * *"

convenience and necessity; and, (c) the PUC orders attempting to regulate patterns of service and scheduling impose an undue burden on interstate air commerce. Although Allegheny and the CAB concede that the states have authority to control certain economic aspects[6] of intrastate air commerce, they contend that such authority does not extend to a federally certificated air carrier servicing an interstate-intrastate route. Accordingly, Allegheny asserts that its dispute with the PUC presents a controversy arising under the Constitution and laws of the United States and that this court's jurisdiction[7] is properly invoked under 28 U.S.C. §1331(a).[8] It asserts further that the federal courts should decide the federal questions rather than leave them for determination by state tribunals. I disagree.

In suits in the federal courts arising out of proceedings pending or threatened in state tribunals, the federal court's jurisdiction may not be predicated upon federal question defenses to the state proceedings.[9] See Public

6. Safety regulations involving aircraft and air flights are exclusively within the jurisdiction of the Federal Aviation Administration.

7. Neither party requested the convening of a three-judge court under 28 U.S.C. §2281. Since it appears that Allegheny is not attacking the constitutionality of the Pennsylvania Public Utility Law, but rather is basing its argument generally on supremacy of federal law, I have assumed that the matter is properly before me as a single judge. See Swift & Co. v. Wickham, 382 U.S. 111, [86 S.Ct. 258, 15 L.Ed.2d 194] (1965); Pennsylvania Public Utility Comm. v. Pennsylvania R.R. Co., 382 U.S. 281, 86 S.Ct. 423, 15 L.Ed. 2d 324 (1965).

8. 28 U.S.C. §1331(a) reads as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter of controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

9. There are exceptions to this principle, notably in suits arising under the Civil Rights Act, 42 U.S.C. §1981 et seq., 28 U.S.C. §1443. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965).

Serv. Comm. of Utah v. Wycoff, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); Public Utilities Comm. of California v. United Air Lines, Inc., 346 U.S. 402, 74 S.Ct. 151, 98 L.Ed. 140 (1953); rev'g 109 F. Supp. 13 (N.D.Cal. 1952); California v. Oroville-Wyandotte Irrigation Dist., 409 F.2d 532 (9th Cir. 1969); Bonanza Air Lines, Inc. v. Public Serv. Comm. of Nevada, 186 F.Supp. 674 (D. Nev. 1960). It is only if the state *complaint* raises federal questions that the federal court's jurisdiction may be based on federal question grounds. Public Serv. Comm. of Utah v. Wycoff, *supra*.

Allegheny, in the instant suit, seeks a declaration that since it is an interstate carrier, it is immune, as a matter of federal law, from the exercise of control by the PUC. The proceedings instituted by the PUC against Allegheny, however, raise only questions of state law, i. e., the extent of the rights and duties conferred upon Allegheny by the state certificate of public convenience and necessity issued pursuant to Pennsylvania's "Public Utility Law", 66 P.S. §1101 et seq. The PUC's complaints raise no federal questions. The federal questions do not enter the picture until they are injected by Allegheny as a matter of defense to the state complaints. Under such circumstances, to quote from Wycoff, *supra*, 344 U.S. at p. 248, 73 S.Ct. at p. 243:

> "[f]ederal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law."

Although this is not properly a federal question matter, there is nevertheless jurisdiction in this court on the grounds of diversity of citizenship. 28 U.S.C. §1332(a).[10]

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10. 28 U.S.C. §1332(a) reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

It affirmatively appears from Allegheny's complaint that it is a Delaware corporation with its principal place of business in the District of Columbia; that the PUC is an agency of the Commonwealth of Pennsylvania; that the individual defendants are all citizens and residents of the Commonwealth of Pennsylvania; and that the amount in controversy exceeds $10,000, consequently, this court has jurisdiction on diversity grounds.

III. *Propriety of Federal Intervention*

Notwithstanding that there is jurisdiction, the question remains whether this court should hear and determine the substantive issues raised by the parties and exercise its power to grant the relief requested. The relief which Allegheny seeks is (1) a declaration that it is not subject to control by the PUC because it is an interstate carrier, and (2) a permanent injunction restraining enforcement of PUC's orders against it or its employees.

Although Allegheny's complaint is not, in terms, brought under the Declaratory Judgment Act, 28 U.S.C. §2201, the first portion of its prayer for relief is declaratory in nature. The Declaratory Judgment Act provides that in a case of actual controversy a competent federal court "may declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought." But whether to grant declaratory relief in a particular case is a matter committed to the court's sound discretion. See A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 82 S.Ct. 337, 7 L.Ed.2d 317 (1961); Brillhart v. Excess Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942); California v. Oroville-Wyandotte Irrigation Dist., *supra*.

Note 10—*Continued*

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

The second portion of the relief sought is injunctive and whether a federal court should use its equity powers to enjoin the enforcement of orders of a state administrative agency is also a matter for the exercise of the court's sound discretion. Alabama Public Serv. Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951).

The Supreme Court of the United States has ruled that where a private party seeks either declaratory or injunctive relief against a state administrative agency, federal courts ordinarily should abstain from exercising their powers in the interest of federal-state comity. Public Serv. Comm. of Utah v. Wycoff, *supra*; Alabama Public Serv. Comm. v. Southern Ry. Co., *supra*. In *Wycoff* there was express disapproval of attempts by lower federal courts to give anticipatory declarations as to state regulatory statutes, including determinations as to the authority of a state administrative agency over an interstate carrier, the Supreme Court stating, 344 U.S. at p. 247, 73 S.Ct. at p. 242:

> "It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State."

Whenever, therefore, the dispute between a private party and a state administrative agency concerns an unsettled question of state law, the federal courts should abstain from awarding declaratory relief. See Bonanza Air Lines, Inc. v. Public Serv. Comm. of Nevada, *supra*.

The doctrine of "equitable abstention" has only recently developed in the federal court system. See Wright, Federal Courts §52; Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749 (1959). As it applies to disputes between private parties and state administrative agencies, the primary thrust of the

doctrine is that where an order of the state agency predominantly affects local matters, if there is available to the aggrieved party adequate state judicial review, the federal courts should refuse to exercise their equity powers to restrain enforcement of the administrative order, thus avoiding unnecessary federal-state conflict. See Alabama Public Serv. Comm. v. Southern Ry. Co., *supra;* Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); Railroad Comm. of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940), as amended, 311 U.S. 570, 61 S.Ct. 343, 85 L.Ed. 358 (1941). Cf. Sayers v. Forsyth Bldg. Corp., 417 F.2d 65 (5th Cir. 1969); Lerner v. Town of Islip, 272 F.Supp. 664 (E.D.N.Y.1967); Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Comm., 109 F.Supp. 385 (W.D. Pa. 1952). But see Public Utilities Comm. of Ohio v. United Fuel Gas Co., 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943) (where the exercise of federal court's equity powers was approved because of an inordinate delay in disposing of the matter in dispute). They should exercise such powers only when they are convinced that asserted federal rights cannot be preserved except by the granf of the extraordinary relief of an injunction. Alabama Public Serv. Comm. v. Southern Ry. Co., *supra*. See also, Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

The instant case is clearly one for the application of the doctrine of federal abstention.

First, the dispute between the PUC and Allegheny predominantly affects local matters, i. e., intrastate air service and the scope of authority and procedures of the state administrative agency.

Second, the dispute involves an unsettled question of state law, i. e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier. The parties have cited no Pennsylvania authorities defining the limits of the PUC's authority over rights granted to such

carriers.[11] Until the state courts speak to the question we cannot know whether they will interpret the PUC's authority under the state act narrowly or broadly. In making their determination as to the scope of the PUC's authority, the state courts are bound, just as the federal courts are, to interpret and apply the federal Constitution and laws, and all of the arguments which Allegheny has sought to raise here under the interstate commerce and supremacy clauses of the federal Constitution must be given full consideration by the state courts. See Bonanza Air Lines, Inc. v. Public Serv. Comm. of Nevada, *supra*.

Finally, Pennsylvania law provides adequate judicial review of the actions of the PUC. At the time the PUC's order was entered Allegheny could have obtained review by seeking a preliminary injunction in the Court of Common Pleas of Dauphin County,[12] with a full hearing on the merits (66 P.S. §1441) and right of appeal to the Superior and Supreme Courts of Pennsylvania; or it might have appealed directly to the Superior Court to have the order of the PUC declared null and void (66 P.S. §1431). Under either procedure, there was available to Allegheny process for obtaining a writ of supersedeas to stay enforcement of the order pending judicial disposition. (66 P.S. §1433). Federal questions raised in any of the state court proceedings would be reserved for final review, by certiorari, to the Supreme Court of the United States, Public Serv. Comm. of Utah v. Wycoff, *supra*.

The foregoing are the state procedures which were available to Allegheny at the time the PUC's orders

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11. Since the state courts have not as yet determined the extent of PUC authority in this field, this decision does not conflict with City of Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed. 2d 1174 (1958).

12. Jurisdiction is now vested in the Commonwealth Court of Pennsylvania by "The Commonwealth Court Act", 17 P.S. §211.1 et seq.; 17 P.S. §211.14(a) (55).

were entered. The time for appeal to the state courts has long since passed. It appears that Allegheny may have deliberately permitted the appeal time to pass in order to obtain a ruling from the federal court as to the extent of the state administrative agency's authority over it. If Allegheny has, by that tactic, irretrievably lost the opportunity for judicial review of the administrative order, it was by its own choice. The fact that it has no other recourse for review is not sufficient reason for this court to exercise its power. Allegheny's evasion of state procedures should not be rewarded by a federal court of equity which must always be actuated by a "scrupulous regard for the rightful independence of state governments." Alabama Public Serv. Comm. v. Southern Ry. Co., *supra*, 341 U.S. at p. 349, 71 S.Ct. at p. 768. Permitting the bypassing of state procedures would lead to federal district courts becoming courts of review for state administrative agencies and to needless conflict between federal and state governments. See Trapp v. Goetz, 373 F.2d 380 (10 Cir. 1966).

For the foregoing reasons, this court will abstain from exercising its jurisdiction to consider the substantive issues sought to be raised by the parties. Allegheny's motion for summary judgment will be denied. PUC's motion for summary judgment, to the extent that it seeks dismissal of these proceedings, will be granted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1057

ALLEGHENY AIRLINES INC., *Appellant*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III and LOUIS J. SPARVERO, Members of The Commission

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(D.C. Civil Action No. 69-2148)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 4, 1972

Before HASTIE and ROSENN, *Circuit Judges*
and McCUNE, *District Judge*

OPINION OF THE COURT

(Filed July 21, 1972)

ROSENN, *Circuit Judge.*

Allegheny Airlines, Inc. (Allegheny) brought suit in the United States District Court for the Eastern District of Pennsylvania seeking a declaratory judgment holding that certain of the Pennsylvania Public Utility Commission's (PUC) orders and rules, pertaining to air service

between Pennsylvania cities, constituted an unlawful intrusion upon an area occupied exclusively by federal legislation. Allegheny also sought to perpetually enjoin the PUC from further actions against it.[1] The district court decided that the case presented a situation in which it was compelled to abstain. It therefore dismissed the complaint. *Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n.*, 319 F. Supp. 407 (E.D. Pa. 1970). From this decision, Allegheny appeals.

I. BACKGROUND

Allegheny received from the PUC an intrastate freight certificate in 1940, and a passenger certificate in 1949. Until 1963, one of the services provided by Allegheny, and for which it was and is certificated by the PUC, was non-stop service between Williamsport and Harrisburg, a distance of some 71 miles.

The flight between Harrisburg and Williamsport was part of a longer flight route designated by the PUC "intrastate route No. 5." It appears that intrastate route No. 5 was a segment of a still larger route, certified by the Civil Aeronautics Board (CAB), which is interstate in nature. That is to say, planes coming from outside of Pennsylvania fly through the state, landing along the route designated intrastate route No. 5.

In 1963, Allegheny unilaterally discontinued the segment of intrastate route No. 5 which directly connected Williamsport and Harrisburg. Allegheny did not entirely eliminate either Harrisburg or Williamsport from all Allegheny plane service. It was still possible to travel by air on Allegheny airplanes between Williamsport and Harrisburg, although such a journey might require flying to numerous distant points, on a variety of planes, before eventually reaching the desired destination.

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1. The Air Transport Association, National Association of Regulatory Utility Commissioners, and Civil Aeronautics Board have joined this case as Amicus Curiae.

After Allegheny discontinued the Williamsport-Harrisburg segment of route No. 5, the PUC and Allegheny entered into negotiations. In the meantime, Allegheny discontinued furnishing single plane direct service between at least six other pairs of points within Pennsylvania. All these discontinuances were on intrastate routes authorized and certificated by the PUC. Subsequently, the negotiations between the airline and the PUC broke down.

The PUC then took official agency action to compel Allegheny—*not to furnish the discontinued plane service*—but to apply to the PUC, in the manner prescribed by the applicable Pennsylvania law and the regulations of the PUC, whenever it wished to discontinue single plane direct service between intra-Pennsylvania points on routes authorized by the PUC. In the alternative, the PUC sought restoration of the deleted air service.

On June 10, 1968, the PUC issued a "Rule to Show Cause," which noted that Allegheny had abandoned the air service between Harrisburg and Williamsport without seeking approval of the Commission. The rule directed Allegheny to show cause why its certificate of public convenience should not be canceled, and other appropriate penalties imposed, for its discontinuance of service.

Allegheny answered this rule by arguing that under federal law and the CAB regulations and practice, it was permitted to make such changes at will. Further, it contended that "both as a practical matter and a matter of law, its Pennsylvania certificate of public convenience should be interpreted in a manner which is consistent with its federal certificate." It is clear that the thrust of the airline's answer was that federal law and practice had preempted the state regulation asserted by the PUC. A hearing on the Commission's rule was held on September 19, 1968. At this hearing, Allegheny offered no testimony or other evidence concerning the need to discontinue the service in question. Again, it was clear that the thrust of the airline's position was that federal law had preempted the asserted state action.

On June 23, 1969, the PUC entered an order making absolute its rule of June 10, 1968, and directed Allegheny to pay a penalty of $5,000 for its failure *to seek approval* of its abandonment of service between Harrisburg and Williamsport. The PUC also directed Allegheny to reinstitute the service within thirty days or, in lieu thereof, file with the PUC *nunc pro tunc* an appropriate petition or application seeking approval for the abandonment of service.

The June 23rd order was accompanied by an extensive written opinion, which defined the PUC's concerns, and which laid clear the legal foundation for their decision. The Pennsylvania authority for controlling the deletion of direct air service between Harrisburg and Williamsport was 66 P.S. §1122:

> Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, *and not otherwise*, it shall be lawful:
>
> * * *
>
> (b) For any public utility *to abandon or surrender, in whole or in part*, any service. . . .

And 66 P.S. §1171:

> —Every public utility shall furnish and maintain adequate . . . reasonable service. . . . *Such service also shall be reasonably continuous and without unreasonable interruptions or delay.*
> (emphasis supplied.)

The PUC also called attention to its own rule 8(b):

> (b) *Abandonment of Service*—Unless upon termination of certificate or order of the Commission, no common carrier shall abandon, in whole or in part, any operation *without first making application to the Commission for permission to do so.* . . .
> (emphasis supplied.)

The PUC felt that Allegheny's discontinuance of service between Williamsport and Harrisburg clearly came within these laws and regulations because:

> . . . even if facts had been established to indicate that air service between Harrisburg and Williamsport is available via Pittsburgh and or Scranton, this would not establish substantial compliance with respondent's obligation. *To reach a point 71 miles distant by use of several planes, several transfers and the traveling of several hundred miles during a period of several hours is not adequate air service by any standard.*
> (emphasis supplied.)

However, the PUC made clear that it was making no finding as to whether or not Allegheny, after a full and fair hearing, at which evidence was presented, should or should not be able to discontinue the service:

> . . . *we are not* attempting to determine whether or not respondent upon proper application . . . should be allowed to abandon the segment. . . . We do *not* expressly or impliedly, suggest that we may . . . require respondent to render unnecessary, unpatronized, unprofitable service. . . .
> (emphasis in text.)

Two primary considerations were defined as the principal motivations for the agency's action. First, the agency advanced what was essentially an equitable argument: Allegheny itself had approached the Commission, requested certification to fly the delineated intrastate route. In receiving this state benefit, it had accepted a corresponding duty to abide by the state regulations. The Commission thus sought to distinguish this case from one in which an airline had never sought state certification and the state agency was itself trying to bring the airline under its regulation:

> While . . . *prior to its Pennsylvania certifications for its intrastate services,* [Allegheny] *was under no obligation* to render intrastate service, *once it sought,* and was granted, and accepted *state certification* to render intrastate service between specific points within the Commonwealth of Pennsylvania, *it accepted the corresponding obligation* to do so under the laws of this state and the Rules and Regulations of this Commission.
> (emphasis supplied.)

The second consideration, interrelated with the first, was the practical effect Allegheny's refusal to come before the Commission, with evidence, might have on the regulatory structure of the PUC. The Commission was obviously concerned because Allegheny, since it first sought state certification in 1940, has become entwined within the state framework for regulating the state's various transportation facilities. As the PUC noted:

> The *thrust of these proceedings* is that existing certificated service *has been found, after application by the carrier* and after opportunity to affected parties to be heard, to be *necessary to the public interest.*
> (emphasis supplied.)

The initial state proceeding—that which found that the service which Allegheny sought to provide was in the public interest—might have affected numerous other facets of the state transportation system, aside from its obvious potential effect upon the plans and patterns of service of other airlines. Certification of public transportation, under the terms of the state act, can only be had if in the public interest. The fact that Allegheny had sought and been granted the route between Harrisburg and Williamsport might have deterred other service between these cities from developing. For example, bus service might have been decreased as a result of the air service which Allegheny offered to, and did, supply.

Moreover, a decision to abandon the air service might mean that the state would need to develop alternative services between these two cities. In any event, the concern of the PUC was that these problems could only be resolved, highlighted and defined through the normal regulatory structure, which provided for public hearings and the presentation of evidence concerning the specific service in question. Unilateral action on the part of public utilities—in total disregard of any procedural requirements—could produce confusion and disruption throughout the state.

Allegheny did not comply with the order of the PUC, nor challenge it before any state court. The airline, however, instituted suit in the district court for the Eastern District of Pennsylvania requesting a declaratory judgment against the PUC and a permanent injunction restraining the PUC from any further action. The district court, on cross motions for summary judgment dismissed the suit. The district court did not reach the merits, but predicated its decision on the abstention doctrine.

II. JURISDICTION

Allegheny pleaded jurisdiction both in terms of diversity, and 28 U.S.C. §1331(a), which gives jurisdiction over matters arising under the "Constitution, laws, or treaties of the United States." The district court did not believe that jurisdiction could properly be based on §1331 because:

> [i]n suits in the federal courts arising out of proceedings pending or threatened in state tribunals, the federal court's jurisdiction may not be predicated upon federal question defenses to the state proceedings. . . . It is only if the state *complaint* raises federal questions that the federal court's jurisdiction may be based on federal question grounds.
> (emphasis in text; citations omitted) *Allegheny Airlines Inc. v. PUC*, supra., at 411.

The district court concluded, however, that jurisdiction was properly grounded in diversity, since Allegheny was a Delaware Corporation with its principal place of business in the District of Columbia, the PUC was an agency of the Commonwealth of Pennsylvania, and finally, because the amount in controversy exceeded $10,000.

Although neither party has raised the jurisdiction issues in this appeal, "it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded." *Mansfield R. Co. v. Swan*, 111 U.S. 379. We believe that the district court correctly determined that §1331 jurisdiction was lacking, even though the issue may not be completely laid to rest. *See* Wright, *Law of Federal Courts*, (1970), at 62. As the district court noted, "[a]lthough Allegheny's complaint is not, in terms, brought under the Declaratory Judgment Act, 28 U.S.C. §2201, the first portion of its prayer for relief is declaratory in nature." *Allegheny Airlines, Inc. v. PUC*, supra, at 412. *Public Util. Comm'n. v. Wycoff Co.*, 344 U.S. 237 (1952) strongly supports the conclusion that suits of this kind, which request declaratory and injunctive relief, and raise the federal issue only as a defense in the state forum, will not support jurisdiction:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, *it is the character of the threatened action, and not the defense*, which will determine whether there is federal-question jurisdiction in the District Court.
> *Id.*, at 248. (emphasis supplied.)

Moreover, this conclusion is in line with the holding expressed in the landmark case of *Louisville and Nashville Ry. Co. v. Mottley*, 211 U.S. 149 (1908).

We, also, believe the district court was correct in holding that the plaintiff had made out a case for diversity of citizenship jurisdiction. The PUC has made no chal-

lenge to diversity jurisdiction or the potential damage which Allegheny alleges.[2] The requirements of diversity appear to be met. *Pennsylvania R. Co. v. City of Girard*, 210 F.2d 437 (6th Cir. 1965).

III. EQUITABLE INTERVENTION

Although jurisdiction exists, a federal court:

> . . . may, in its sound discretion, whether its jurisdiction is invoked *on the ground of diversity of citizenship* or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.'
>
> (citations omitted; emphasis supplied) *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-8 (1943).

The district court believed that this was such a case and therefore abstained. It held that "where a private party seeks either declaratory or injunctive relief against a state administrative agency, federal courts ordinarily should abstain from exercising their powers in the interest of federal state comity." *Allegheny Airlines, Inc. v. PUC*, supra, at 412. The court concluded that "where an order of the state agency predominately affects local matters, if there is available to the aggrieved party adequate state judicial review, the federal courts should refuse to exercise their equity powers to restrain enforcement of the administrative order, thus avoiding unnecessary federal-state conflict." *Id.*, at 413. It noted that in the instant case "the dispute between the PUC and Allegheny predominately affects local matters, i.e., intrastate air service and the scope of authority and procedures of the state administrative agency. *Id.* We agree.[3]

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2. Allegheny's major place of business is Washington, D.C. while the PUC is a Pennsylvania regulatory agency. Allegheny has made the unchallenged allegation that it will suffer damages, as a result of the June 23 order, in excess of $10,000.

3. In what was basically an alternative abstention holding, the district court noted that "the dispute involves an unsettled question of state law, i.e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier." Allegheny

The district court's holding was grounded on *Alabama Comm'n. v. Southern R. Co.*, 341 U.S. 341 (1951). There a railroad company applied to the Alabama Public Service Commission for permission to eliminate certain local passenger service. The Commission refused to allow discontinuance, citing local needs. The company, rather than taking an appeal through the state court system as provided for under state law, filed a complaint in federal district court seeking injunctive relief. Jurisdiction was grounded on diversity of citizenship and the presence of a federal question. A three judge court entered judgment holding the Commission order void and enjoining the Commission from enforcing its order or any penalty provisions of the applicable law.

On appeal the Supreme Court reversed. The crux of its holding was that:

> Equitable relief may be granted only when the District Court, *in its sound discretion* exercised with the *'scrupulous regard for the rightful independence of state governments* which should at all times actuate the federal courts,' is convinced that the asserted federal rights cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of *needless friction* with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case.
>
> (emphasis supplied; citations omitted) *Id.*, at 349-50.

Note 3—*Continued*

Airlines Inc. v. PUC, 319 F. Supp. 407, 413 (E.D. Pa. 1970). Since we find that the district court was correct in abstaining for the primary reasons it developed, we find it unnecessary to decide whether it correctly concluded there existed unclear state law. We note, however, that in our view, the PUC's authority to take the measures described above seems clear. 66 P.S. §1122.

The same critical factors of *Southern Ry.*—that the case involved significant state concerns, and an early entry of a federal court into the area might promote needless friction between state and federal jurisdiction—have formed the basis for abstention in numerous other cases. *See, e.g., Burford v. Sun Oil*, supra, at 332; *Great Lakes Dredge Co. v. Hufflman*, 319 U.S. 293, 298 (1943); *Railroad Commission v. Oil Co.*, 310 U.S. 573, 580 (1940); *Penn v. Williams*, 294 U.S. 176, 185 (1935).

As commentators construing the *Alabama* decision have noted, ". . . the Court must be considered to have ordered abstention *solely* for the purpose of avoiding federal-state friction." *Abstention*, 59 Col. L. Rev. 749, 759 (1968), (emphasis supplied). Whether or not the exercise of equitable abstention will, in a particular case, create federal-state friction, is a question for which there is no one simple test. Thus, equitable abstention has not produced clearly defined rules, as has the traditional and more common ground for abstention enunciated in *Railroad Comm'n. of Texas v. Pullman*, 312 U.S. 496 (1941).[4] However, the primary concern running through the cases in which the Court has abstained for equitable principles seems to be the possibility of friction caused by interference with the orderly procedures and rules of state *regulatory bodies*. *See, e.g., Alabama*, supra, *Burford*, supra. The instant case presents just such a threat: a serious possibility of disturbing the orderly state system of agency regulation of transportation within Pennsylvania.

Allegheny has contended here that it was not required to comply with the procedural regulations of the Commission for discontinuance of service because it was also an interstate air carrier. The Commission, on the other hand, has argued that once a carrier seeks and accepts state certification to render an intrastate service, it accepts the

4. See, generally, Bednar, *Abstention Under Delaney: A Current Appraisal*, 49 Texas L. Rev. 247 (1971); *Abstention and Certification in Diversity Suits*, 73 Yale L.J. 85 (1964); *Consequences of Federal Abstention*, 73 Har. L. Rev. (1960).

corresponding obligation to settle disputes as provided under state law and the rules and regulations of the Commission. Its primary position is that a certificated carrier may not discontinue the service without making an application to do so under Commission regulations and thereby giving affected parties an opportunity to be heard.

Stripped of the efforts to drape this case with federal questions, the facts show that Allegheny, without any attempt on the part of the PUC to extend its regulatory powers over it, made a written application to the PUC for a certificate of public convenience as an *intrastate* carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport. The service it offered to provide was found by that Commission, after a hearing and an opportunity for affected parties to be heard, to be necessary to the public interest. A certificate of public convenience was granted and it is now held by Allegheny. Under the rules of the Commission, all or part of this service may be discontinued upon application by the carrier to the PUC and that agency's approval. Additionally, matters such as this which go to the jurisdiction of the PUC may be tested in special proceedings before the Pennsylvania Commonwealth court. 66 P.S. 1441. The thrust of these Pennsylvania rules and laws is that, once certified, a carrier must test these issues before service is discontinued.

The issue, thus, is not, at this stage, whether the airline may or may not discontinue the service in question because federal legislation has preempted the field. The issue is whether a state certificated public utility may arbitrarily ignore the procedural rules of the Commission which require that issues, including jurisdictional issues, be raised before discontinuance of service. We note that Allegheny might have sought federal declaratory relief before discontinuing the air service.[5] In the alternative, of course,

5. This might, perhaps, have been action substantially equivalent to bringing the preemption issue before the Commission or before the Commonwealth Court under 66 P.S. 1441.

Allegheny might have sought state consideration of its federal preemption argument before discontinuing the air service. It did neither: with no prior warning, and in total disregard of the state policy, it abruptly terminated the state certificated flight. If Allegheny can discontinue state certificated service with no notice and then forestall state action by proceeding to the federal courts, other state certificated carriers may attempt similar action. The carefully regulated state transportation system could be thrown into chaos. For this court to reach the merits of Allegheny's contentions would be to ignore the state regulatory body in the same manner the airline has. This is precisely the kind of action that the Supreme Court has counseled against. *See, e.g., Alabama*, supra.

There are several additional factors, perhaps unique to this case, which also dictate our conclusion that the district court correctly exercised its discretion. First, we note that the state concerns, in terms of the subject matter in question here, are significant. Commercial carriers can operate only if airports, runways, and related facilities are provided. These often require large expenditures, particularly in densely populated areas, frequently at considerable community sacrifice and effort. The communities involved here may have come to depend on the direct air service which Allegheny has supplied in the past. If this be true, the arbitrary discontinuance of direct air service without notice, an opportunity to be heard, or time in which to secure other means of transportation, may leave them isolated. We can only suggest, and not document, the local needs because of Allegheny's decision to discontinue the air service without first approaching the Commission. However, in any case, under the applicable Pennsylvania law, a presumption exists that certificated public utility service is needed and vital, until a public utility itself proves otherwise. *Hostetter v. PUC*, 49 A.2d 862 (Super. Ct., Pa. 1946).

Secondly, Allegheny has presented no evidence which suggests that it would have been harmed had it had to

resort to the state agency forum, or Commonwealth courts, before discontinuing the air service in question. It has approached the PUC for route changes many times, and it appears that all the airline's requests have been granted.[6] In any case, Allegheny may be able to raise its preemption arguments, should the PUC proceed to state court to enforce the order of June 23. *Cf. Jones Motor Co. v. Pennsylvania Public Utility Comm'n.*, 149 A.2d 491 (Super. Ct. Pa.), reversed on other grounds, 361 U.S. 11 (1959).

Thirdly, if local communities have come to rely upon the services provided by Allegheny, such reliance would be reasonable in light of the affirmative action of the airline itself. Approximately thirty years ago, the airline sought and was granted, rights to transport property on intra-Pennsylvania routes; approximately twenty years ago, it sought, and was granted the right by the PUC to transport persons as well as property between points in Pennsylvania. From that date, until the action delineated here, the airline has complied with the procedural requirements of Pennsylvania law. Thus, this case is significantly different—and poses a greater danger of exacerbating federal state relations—than the case of an airline which has never approached a state commission, and finds that a state commission is attempting to regulate it for the first time on the supposition that it is engaging in intrastate operations. *See e.g., Pub. Util. Comm'n. v. United Air Lines*, 346 U.S. 402 (1953).

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6. The stipulated statement of facts makes clear that Allegheny has worked within the framework of the PUC's regulations for many years. On many occasions when it wished to eliminate service to a Pennsylvania city, it has sought the PUC's prior approval. To cite but one example, on May 22, 1968, it petitioned the PUC to allow it to eliminate Hazleton as a point serviced by Allegheny airplanes. It also appears from the various changes in Allegheny's certificate of public convenience that it has approached the PUC when it wanted to add a stop flight between points which were being serviced by non-stop direct service. Thus, for example, it requested, on September 12, 1960, to service Reading as an intermediate point on its intrastate route No. 2 between Pittsburgh and

Fourthly, the danger of creating federal-state friction is intensified because of the peculiar nature of the relief requested by the airline. At oral argument, the district court pointed out that Allegheny was seeking the best of all possible worlds. It wished to retain its state rights and, at the same time, to be relieved by federal injunction of its state duties.[7] This is precisely what the airline desires. It asks for a perpetual injunction which would enjoin the PUC from "*any action or proceeding* for any violation of the laws of the Commonwealth of Pennsylvania based upon action by Allegheny in changing its patterns of service." Yet, if this relief be granted, the PUC would be unable to terminate the airline's state certificates of public convenience. The airline, while not being subject to state regulation, would maintain whatever benefits accrue to holders of state public utility certificates. The case therefore is different from that of an interstate carrier whose routes contain several short intrastate segments, and who wishes to surrender its state certificate and remove itself totally from the state jurisdiction.

Finally, we do not believe that there are significant federal concerns which would override the other factors mentioned above. Even if it should be ultimately deter-

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Philadelphia. Finally, it also appears from the changes in Allegheny's certificate of public convenience that it has received PUC approval to eliminate non-stop air service between Pennsylvania cities. Thus, for example, in April of 1953, it sought approval to eliminate the flight between Johnstown and Dubois, which had been designated intrastate route No. 5.

7. The district court noted:

. . . you [Allegheny] are at somewhat of a disadvantage in that you come before me, having sought and obtained certain local rights, having had those local authorities who granted you those rights determine that you are not complying, and in your having failed to either pay the fine or keep the rights because you are dissatisfied with the interpretation, and instead you are asking me to enjoin them from enforcing their interpretation, of the rights they have granted you and *yet at the same time permit you to retain those rights.*
(emphasis supplied).

mined that the state does not have power to regulate the actions which precipitated this suit, a temporary co-existence of federal-state regulation will not frustrate any immediate goals or policies of the Federal Aviation Act. At least a residual power to regulate air transportation lies with the states. The scheme of federal control has not been hampered, even though some areas exist over which the states exercise sole or concurrent control.[8] *See, e.g., Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1962); *Pub. Util. Comm'n. v. United Air Lines*, 346 U.S. 402 (1953); *Loma Portal Civic Club v. American Airlines, Inc.*, 394 P.2d 548 (Sup. Ct. Calif. 1964); *People v. Western Air Lines*, 268 P.2d 723 (Sup. Ct., Cal. 1954).

For the reasons outlined above, we conclude that the district court did not abuse its discretion in refusing to exercise its power to intervene.

The judgment will be affirmed.

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8. All parties to this suit, including the amicus Civil Aeronautics Board, agree that under current CAB regulations, Allegheny may, or may not, at its option, connect Harrisburg and Williamsport by non-stop flights. Additionally, the CAB has declined to take a position with respect to the district court's jurisdiction or the appropriateness of its exercise.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 71-1057

ALLEGHENY AIRLINES, INC., *Appellant*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III and LOUIS J. SPARVERO, Members of The Commission

---

(D. C. Civil Action No. 69-2148)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE and ROSENN, *Circuit Judges*, and McCUNE, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 10, 1970, be, and the same is hereby affirmed, with costs taxed against the appellant.

ATTEST:

M. Elizabeth Ferguson

Chief Deputy Clerk

July 21, 1972

Certified as a true copy and issued
in lieu of a formal mandate on
September 21, 1972.

Test: FRANCES R. MATYSIK
Deputy Clerk, United States Court
of Appeals for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 71-1057

ALLEGHENY AIRLINES, INC.,

Appellant

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III and LOUIS J. SPARVERO, Members of The Commission

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SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, HASTIE, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges* and McCUNE, *District Judge*

The petition for rehearing filed by

Allegheny Airlines, Inc.

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Van Dusen concurs in

this order because he concurs in the result reached by the opinion of July 21, 1972 as stated in these words: ". . . we conclude that the district court did not abuse its discretion in refusing to exercise its power to intervene." (p. 16, slip opinion)

By the Court,

Dated: September 13, 1972 Circuit Judge

Judge Gibbons dissents from the denial of the petition for rehearing, on the ground that this is an inappropriate case for abstention.

FEDERAL AVIATION ACT OF 1958:

§1302. Consideration of matters in public interest by Board

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement and development of civil aeronautics. Pub.L. 85-726, Title I, §102, Aug. 23, 1958, 72 Stat. 740.

Public Utility Law:

§1102. Definitions

The following words, terms and phrases shall have the meanings ascribed to them in this section, unless the context clearly indicates otherwise.

. . .

(5) "Common Carrier" means any and all persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property, or both, or any class of passengers or property, between points within this Commonwealth by, through, over, above, or under land, water, or air, and shall include forwarders, but shall not include contract carriers by motor vehicles, or brokers, or any bona fide cooperative association transporting property exclusively for the members of such association on a nonprofit basis.

. . .

(17) "Public Utility" means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:

. . .

(c) Transportaing passengers or property as a common carrier;

. . .

§1122. Enumeration of acts requiring certificate

Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(a) For any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized by—

(1) A certificate of public convenience heretofore or hereafter granted under this act or under The Public Service Company Law, July 26, 1913 (P.L. 1374), or

(2) A registration certificate granted by the commission under section 1401 of this act, or

(3) An unregistered right, power or privilege preserved by section 1401 of this act.

(b) For any public utility to abandon or surrender, in whole or in part, any service: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron.

(c) As a condition of its approval of any transaction covered by this section and involving those railroad carriers wholly located within this Commonwealth subject to the provisions of this act, the commission shall require a fair and equitable arrangement to protect the interests of the railroad employes affected and the commission shall include in its order of approval the terms and conditions it deems fair and equitable for the protection of the employes.

(d) The terms and conditions which the commission prescribes shall provide that, during the period of four years from the effective date of the order, the employes of the railroad carrier affected by the order shall not be in a worse position with respect to their employment except that any protection afforded an employe shall not be required to continue for a period longer than that during which the employe was in the employ of the railroad carrier prior to the effective date of the order. Notwithstanding any other provision of this section, the commission may accept as fair and equitable an agreement pertaining to the protection of the interests of the employes entered into by the railroad carrier and the duly authorized representatives of the employes.

(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to

acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service: Provided, however, That such approval shall not be required—(1) if the undepreciated book value of the property to be acquired or transferred does not exceed one thousand dollars; or (2) if the undepreciated book value of the property to be acquired or transferred does not exceed the lesser of —(a) two per centum of the undepreciated book value of all of the fixed assets of such public utility, or (b) five thousand dollars in the case of personalty or fifty thousand dollars in the case of realty; or (3) if the property to be acquired is to be installed new as a part of or consumed in the operation of the used and useful property of such public utility; or (4) if the property to be transferred by such public utility is obsolete, worn out or otherwise unserviceable.

But exceptions (1), (2), (3), and (4) shall not be applicable, and approval of the commission evidenced by a certificate of public convenience shall be required, if any such acquisition or transfer of property involves a transfer of patrons.

(f) For any public utility to acquire five per centum or more of the voting capital stock of any corporation.

(g) For any municipal corporation to acquire, construct, or begin to operate, any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits.

As amended 1963, Aug. 24, P.L. 1225, §2; 1971, July 14, P.L. —, No. 44, §1.

§1183. Proper service and facilities established on complaint

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unrea-

sonable, unsafe, inadequate, insufficient, or unreasonably discriminatory or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public, and shall fix the same by its order or regulation. 1937, May 28, P.L. 1053, art. IV, §413.

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Supreme Court, U. S.
FILED
JAN 8 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1972
No. 72-855

ALLEGHENY AIRLINES, INC.,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and Its Chairman, GEORGE I. BLOOM, and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT, III, and LOUIS J. SPARVERO, Members of the Commission,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the Court of Appeals (App. 13a) is reported at 465 F. 2nd 237. The Opinion of the United States District Court for the Eastern District of Pennsylvania (App. 1a), entered November 10, 1970, is reported at 319 F. Supp. 407.

JURISDICTION

The judgment of the Court of Appeals (App. 29a) was entered on July 21, 1972. A timely petition for rehearing was denied on September 13, 1972 (App. 31a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Under the undisputed facts, as found by the District Court after full stipulation of facts by the parties, did the District Court *abuse its discretion* in applying the doctrine of federal abstention, and did the Court of Appeals and the Court of Appeals en banc err in concluding that the District Court did not abuse its discretion in the circumstances?

STATEMENT OF THE CASE

The instant petition of Allegheny Airlines, Inc. (Allegheny) results from a suit brought by Allegheny seeking (1) a declaration that it is not subject to the Pennsylvania Public Utility Law nor the Rules and Regulations of the Pennsylvania Public Utility Commission (Commission or P.U.C.), and (2) a permanent injunction restraining issuance and enforcement of the Commission's orders purporting to be pursuant thereto.

After timely answer filed by the P.U.C. denying and controverting the legal conclusions set forth in Allegheny's complaint, *the parties filed a full stipulation of the facts* to be used by the Court, insofar as might be necessary, as a basis to determine the proper disposition of Allegheny's complaint. The parties filed cross motions for summary judgment. Briefs were filed by the parties and by the Civil Aeronautics Board (C.A.B.) and the National Association of Regulatory Utility Commissioners (NARUC) as amicus curiae. However, the C.A.B. expressly and emphatically took *no position* on the issue now before your Honorable Court, the issue of federal abstention. After consideration of the aforesaid briefs and oral argument, the Honorable Alfred A. Luongo, for the United States District Court for the Eastern District of Pennsylvania, denied the motion of Allegheny and granted the motion of the defendant Commission for summary judgment to the extent that it had sought dismissal of Allegheny's complaint.

In these proceedings, plaintiff, Allegheny, sought an injunction restraining defendants, the Pennsylvania Public Utility Commission and the members thereof, from carrying out their function and fulfilling their duty under the Pennsylvania Public Utility Law of supervising, maintaining and enforcing adequate, efficient, safe and reasonable common carrier air transportation service in the carriage of passengers and property, by air, for compensation, *between points within the Commonwealth of Pennsylvania, in intrastate commerce.* In substance, Allegheny contended that it may cease, interrupt, discontinue, commence and/or abandon *intrastate* air service between two points within the Commonwealth of Pennsylvania (including service for which it sought, was granted, and held a certificate of public convenience by the Commission) at its own whim; that it may, in effect, disregard the interests and needs as well as the accommodation of Pennsylvania residents, disregard the laws of the Commonwealth of Pennsylvania and the Rules and Regulations of the Commission, and disregard the orderly administration and regulation of transportation within the State of Pennsylvania; and that it now has become so big that the Federal Courts must allow it to do so. However, the Commission contended that both the law and the facts are otherwise and that Allegheny, despite its tremendous growth in size, must still abide by the Pennsylvania Public Utility Law and the Rules and Regulations of the Commission, *insofar as such regulation is permitted under the provisions of the Constitution of the United States and the Acts of Congress.*

Initially, Allegheny had filed an application with the Pennsylvania Public Utility Commission seeking certification of rights *to transport property* by air in intrastate commerce within Pennsylvania, on December 30, 1940. Pursuant thereto the Commission granted rights to Allegheny (then under the corporate name of All American Aviation, Inc.) by order dated August 19, 1941, to transport *property* in intrastate commerce by air between specified points in Pennsylvania over specified routes within Pennsylvania. Allegheny first filed an application with the Commission seeking certification of right to transport *persons and property* in intrastate commerce by air within Pennsylvania on November 1, 1948. The Commission approved the application on March 21, 1949 and issued a certificate of public convenience on March 28, 1949.

Allegheny, in accordance with the Pennsylvania Public Utility Law and the Pennsylvania Commission's Aircraft Regulations, from time to time thereafter, sought and received the approval of the Pennsylvania Commission to institute specific new and additional intrastate air service routes, when appropriate, and to abandon or suspend various specific intrastate air service routes when that was found appropriate by the Commission. In recent years, Allegheny, when it felt it was to its advantage to do so, abandoned various Pennsylvania intrastate markets without receiving or seeking Commission approval. Allegheny from time to time offered a variety of excuses for its failure to seek such approval, but seldom offered the same excuse twice in succession. This led to the Commission's rule to show cause against

Allegheny, which rule commenced the formal proceedings which ended with the Commission's order of June 23, 1969. Such order discussed at length all of Allegheny's contentions expressed or implied and found no merit therein. Accordingly, the Commission assessed a penalty against Allegheny and ordered Allegheny to file the necessary papers to reflect properly the rights granted to it by the Commission and the rights which Allegheny was entitled to exercise and intended to exercise. Allegheny did not appeal said order—nor did Allegheny comply with it. After the time for appeal had passed, the Commission commenced further proceedings to enlarge and enforce said order. Only then did Allegheny advise the Commission that it contemplated instituting and prosecuting proceedings in the Federal District Court, and requested that the Commission hold further enforcement proceedings in abeyance. To date, the Commission voluntarily has done so.

In the proceedings before the Commission, the basic issue raised by Allegheny was the *interpretation* by the Commission of its rules and regulations and whether such interpretation was in accord with Pennsylvania state law. Issues of alleged burden on interstate commerce and Federal preemption were only *inferentially, vaguely and incidentally* raised as alternative issues. Before the District Court, Allegheny emphasized the alleged incorrect *interpretation* by the Commission of its rules and regulations and the alleged burden on interstate commerce.

The District Court, in granting the Commission's motion for summary judgment, *found that although*

Allegheny's complaint did not properly involve a federal question, the Court nevertheless had jurisdiction on the grounds of diversity of citizenship. However, the District Court concluded that because, inter alia, (1) the dispute predominantly affected only local matters, (2) the dispute involved an unsettled and untried question of state law, (3) Pennsylvania law provides adequate judicial review, and Allegheny had inequitably tried to circumvent state procedures, Allegheny's evasion of state procedures, under the circumstances, should not be *rewarded* by a federal *court of equity.* Accordingly, the District Court abstained from exercising its jurisdiction.

Upon appeal to the United States Court of Appeals for the Third Circuit, that Court, after thoroughly reviewing all of the facts and the applicable law and having held oral argument thereon, concluded that the District Court did not abuse its discretion in applying the doctrine of federal abstention in the circumstances of this case. Before the Court of Appeals, Allegheny depended almost solely on the unsupported allegations of *implied* federal preemption. *Nevertheless, Allegheny admitted before the Court of Appeals, as it had before the District Court and the Commission, that the Federal Aviation Act does not preempt all aviation or even all economic regulation of aviation and that the Commission had the undoubted right to grant and regulate purely intra-Pennsylvania rights.* In the circumstances, the Court of Appeals held that the District Court had not abused its discretion.

Thereafter, Allegheny petitioned for rehearing before the Court of Appeals en banc. Unable to find

any abuse of discretion, the Court en banc denied the petition for rehearing.

The petition, now before your Honorable Court, followed.

ARGUMENT

Summary of Argument

There is no basis for the issuance of the writ sought. On the basis of the facts found by the District Court from the facts stipulated to by the parties, petitioner clearly and unquestionably should not be granted equitable relief—or rewarded in any way—by the Federal Courts.

This case provides a classic example (1) of why, how and where the doctrine of federal abstention should and does apply; (2) of the well-established principles of equity which require a denial of relief to a party who is guilty of misconduct or who has not displayed even the most rudimentary fairness in respect to the matter in controversy and who attempts to benefit by its own unfairness and, consequently does not come into Court with clean hands and (3) of the equally well-established principle of equity which requires the denial of injunctive relief where no irreparable injury is shown and where there is adequate remedy at law which the party seeks to circumvent.

All the law applicable to the facts in the instant case is clear and well-settled, and there are no contradictory federal appellate court opinions.

There was, is, and can be no substantial federal question involved in these proceedings; nor should there be.

The Petition for the Writ Should Be Denied

The petition for the writ should be denied, inter alia, for the following reasons:

(1) There is no substantial federal question involved.

The issue before your Honorable Court is neither a federal issue nor a substantial issue. It involves only the narrow issue of the propriety of the exercise of the District Court's discretion in determining whether, under the peculiar and unique facts of this case, the Federal Court should grasp litigation where the dispute involves only a previously unraised question of state law, and the Order of the state agency raises no federal issues, predominantly affects local matters, and applies, and is intended to apply, only to intrastate commerce; and where there is available to the aggrieved party more than adequate state judicial review.

(2) The instant case clearly is one for the application of federal abstention.

There are myriad cases holding that federal abstention is proper; there are myriad cases holding that federal abstention is not proper. However, though this superficially appears to be contradictory, it is the very essence of consistency for the propriety of the application of the doctrine of federal abstention depends upon the facts involved in each case. Each and all of the referred-to myriad cases may be correct and proper. As the facts go, so goes the application of the doctrine.

The District Court and the Court of Appeals and the Court of Appeals en banc carefully examined the peculiar stipulated facts of this case and there was, is, and can be no doubt that the District Court's discretion was wisely used. The opinions of both courts discuss the peculiar facts of the instant case, and also discuss various cases involving the question of when the doctrine of federal abstention is applicable. To further discuss them or others at length would be repetitious and merely an affectation of learning and possibly an affront to your Honorable Court. Suffice it to say that your Honorable Court has, on frequent occasions, held that among circumstances which should impel a Federal Court to abstain from blocking exercise by state officers of their appropriate functions, are the desirability of avoiding unseemly conflict between two sovereignties, unnecessary impairment of state functions, and premature determination of constitutional questions. See *Martin v. Creasy,* 360 U.S. 219 (1959). All those circumstances are present in the instant case. Your Honorable Court also has held many times that Federal Courts should not adjudicate state enactments until state courts have been afforded reasonable opportunity to pass on them because unnecessary interference by Federal Courts with proper and validly administered state concerns must be avoided at all cost, and because a scrupulous regard for rightful independence of state courts should at all times actuate the federal courts. See *Harrison v. N.A.A.C.P.,* 360 U.S. 167 (1959). The instant case before your Honorable Court involves (as clearly found by the District Court and affirmed by the Court of Appeals and

the Court of Appeals en banc) inter alia, the following circumstances which make the abstention doctrine applicable:

(a) the dispute involves predominantly local matters;

(b) the dispute involves a previously unraised question of state law;

(c) Pennsylvania law provides adequate judicial review;

(d) petitioner apparently is deliberately attempting to create federal-state conflict where there is, should be, and need be none;

(e) petitioner did not come into equity court with clean hands.

In cases such as the instant case, any claim of supersedure should be reserved, if at all, in state proceedings. *Rice v. Chicago Board of Trade*, 331 U.S. 247, 255, 256; compare *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218.

Petitioner relies heavily on the *Chemical Specialties* case. There, as in all cases cited by petitioner, the facts involved and consequently the law involved are inapposite. There was an *express* preemption involved in *Chemical*. In the instant case there is no expressed preemption involved. In fact, there is not even an implied preemption involved, but only a vague self-contradicted unsupported assertion that there might be a *partial* implied preemption which petitioner has never been able to describe, define or delineate. In the *Chemical* case the lower court was reversed, primarily because it did not have a fac-

tual, evidentiary record before it. In the instant case there was a stipulation of all the relevant and material facts. In the *Chemical* case, the Court clearly differentiated factual situations (such as we have in the instant case) where the claim rests on the Commerce Clause alone or on a federal statute without a preemption clause; where there is no claim that Congress has *fully* occupied the field or that there is *necessarily irreconcilable* conflict; and where a full record has been presented and fully briefed and argued to the District Court.

Clearly and conspicuously, the *Chemical* case as well as all others cited by petitioner, involve totally different and inapplicable factual basis and circumstances. *Every appellate decision must be understood to apply only to the facts upon which it is predicated and to extend only to what, so understood, it actually decides.*

(3) There could have been no substantial federal issues involved in the instant proceeding.

Even if petitioner had been able honestly to allege the necessary facts and properly could have raised the issue it was apparently attempting to raise, there would have been no substantial federal issue involved. In similar cases, where there was the factual support which is lacking here and where appropriate procedures were followed, your Honorable Court held that there was no substantial federal issue and sanctioned the economic regulation by the states of interstate air carriers who were also intrastate instrumentalities: See:

Braniff Airways, Inc. v. Texas Aeronautics Commission, 400 U.S. 943 (1970);

People v. Western Airlines, 118 Cal. 2d 572 (1954), dismissed "for the want of a substantial Federal question," sub. nom. *Western Airlines v. California,* 348 U.S. 859 (1954);

United Airlines v. Public Utilities Commission, 37 Cal. 2d 1 (1952). Dismissed "for the want of a substantial Federal question", 342 U.S. 908 (1952);

Northwest Airlines v. Minnesota, 322 U.S. 292 (1944);

Braniff Airways v. Nebraska State Board, 347 U.S. 590.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the opinions of the District Court and the Court of Appeals, the petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

No. 72-855

ALLEGHENY AIRLINES, INC.,

Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM, and JAMES McGIRR KELLY, LOUIS J. SPARVERO, and ROBERT K. BLOOM, members of the Commission,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

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Supreme Court of the United States

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits, as provided by Rule 42 of the Rules of this Court, the following brief *amicus curiae* in this case in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by Allegheny Airlines, Inc. (Allegheny).

Counsel for Allegheny, Petitioner, and counsel for the Pennsylvania Public Utility Commission (Pennsylvania PUC) and its members, Respondents, have consented to the NARUC's filing this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 465 F.2d 237 and reprinted in Appendix A, pp. 13a-28a of the Petition for Writ of Certiorari. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 319 F. Supp. 407 and is reprinted in Appendix A. pp. 1a-12a of the Petition.

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals Properly Affirmed, on the Grounds of Equitable Abstention, the District Court's Dismissal of Allegheny's Suit to Enjoin the Pennsylvania PUC from Requiring Allegheny to Obtain the Pennylvania PUC's Approval Prior to Discontinuing Direct Service Over an Intrastate Route for which Allegheny had Previously Sought and Obtained from the PUC a Certificate of Public Convenience?

II. Whether the Federal Aviation Act of 1958 Prevents Pennsylvania from Administering a Reasonable Regulatory Program to Protect the Public Interest of Travelers Using Intrastate Air Transportation?

THE INTEREST OF THE NARUC AS *AMICUS CURIAE*

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials, including the Commissioners of the Pennsylvania PUC, Respondents herein, charged with the duty of regulating air transportation within their respective States and, as such, they have the obligation to assure the establishment and maintenance of such air transportation and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates and charges that are just and reasonable.

The NARUC has actively participated in the court of appeals and district court below as an *amicus curiae*, submitting *amicus curiae* briefs with the court of appeals on April 12, 1971 and September 6, 1972, and with the district court on June 20, 1972.

STATEMENT OF THE CASE

Allegheny seeks review of the dismissal of its suit to enjoin the Respondents, the Pennsylvania PUC and its members, from enforcing Pennsylvania law which requires Allegheny to either: provide direct service over an intrastate route between Harrisburg and Williamsport, pursuant to the PUC certificate held by Allegheny; or seek the approval of the PUC to discontinue such service. Allegheny also seeks to avoid having to obtain PUC approval for any

other intrastate service changes it may desire to make, irrespective of what public interest considerations may be involved.

Allegheny is the largest local service airline carrier in the Nation (319 F. Supp. at 409, Allegheny's Petition, App., p. 2a; Stip. 2). Its present route structure covers seventeen States, the District of Columbia and Canada. *Id.* The area served is roughly defined by St. Louis/Chicago on the West, Toronto on the North, Boston on the East, and Memphis/Norfolk on the South. More than 50% of the Nation's population is contained in this area (Stip. 4).

Of the seventeen States served by Allegheny, it only provides intrastate service in the following nine: Connecticut, Indiana, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and West Virginia (319 F. Supp. at 409, Allegheny's Petition, App., p. 2a; Stip. 10).

Pursuant to an application by Allegheny, the Pennsylvania PUC first certificated it on August 19, 1941, to transport *property* by air in intrastate commerce within Pennsylvania (319 F. Supp. at 409, Allegheny's Petition, App., p. 2a; Stip. 11). On January 11, 1949, Allegheny received a certificate from Civil Aeronautics Board (CAB) to provide interstate passenger service over a route structure, designated as "Route 97," covering the District of Columbia and seven States, including Pennsylvania (*Id.*; Stip. 1). On March 21, 1949, the Pennsylvania PUC approved Allegheny's application to transport *persons* and property by air in intrastate commerce within the State (*Id.*; Stip. 11).

In the years since 1949, or more explicitly from January 29, 1951 to November 24, 1969, the Pennsylvania PUC has issued thirteen orders which have granted *every* application of Allegheny to abandon, suspend, substitute or extend

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ervice (Stip. 12-14). The Stipulation entered into by the arties does not reveal *one instance* where the Pennsylvania PUC has denied an application of Allegheny.

The Pennsylvania PUC in a certificate issued on Septemer 11, 1967, redefined Allegheny's authority to provide ervice over several routes, number (5) of which provides or service "Between Erie and Harrisburg via Bradford and Williamsport" (Complaint, Exh. A).

The Pennsylvania PUC on June 10, 1968, issued a rule o show cause, reciting that it had received information inlicating that Allegheny had abandoned direct service beween Harrisburg and Williamsport without PUC approval, nd ordering Allegheny to show cause why its certificate hould not be cancelled or other penalties imposed for bandonment of such service contrary to Pennsylvania law 465 F.2d at 239, Allegheny's Petition, App., p. 15a; Comlaint, Exh. A).

Allegheny on August 1, 1968, responded to the rule to how cause by answering: that direct, single-plane service etween every city pair on a linear route served by a cerificated air carrier is not required by the CAB and hence hould not be required by the PUC; that such a requirenent would "create a serious economic drain" on Allegheny nd thereby "constitute an impermissible burden on interate commerce"; that Allegheny meets its basic certificate bligation, both Federal and State, by providing service beween Harrisburg and Williamsport via on-line connections t Pittsburgh or Wilkes-Barre/Scranton; and that therefore llegheny had not abandoned its Harrisburg-Williamsport oute. Allegheny requested the PUC to vacate the rule to how cause and to terminate the proceeding (*Id.*; Complaint, xh. B).

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The Pennsylvania PUC on September 19, 1968, held a hearing on its rule to show cause and Allegheny's answer. In this hearing, Allegheny chose to offer *no* testimony and *no* exhibits, but relied on statements for the record by its counsel (*Id.*; Complaint, Exh. C, pp. 3, 5).

The Pennsylvania PUC on June 23, 1969, issued an order imposing on Allegheny a penalty of $5,000 for failure to seek Pennsylvania PUC approval for the abandonment of direct service between Harrisburg and Williamsport, and directing Allegheny to reinstitute such service or in lieu thereof to file with the PUC a *nunc pro tunc* application to abandon such service (465 F.2d at 239, Allegheny's Petition, App., p. 16a; 319 F. Supp. at 410, Allegheny's Petition, App., p. 4a; Complaint, Exh. C, p. 11).

Meanwhile, the Pennsylvania PUC on May 26, 1969, issued another rule to show cause reciting that Allegheny had abandoned certain other intrastate service and instituted new intrastate service within Pennsylvania without the approval of the PUC. Accordingly, the PUC ordered Allegheny to show cause why its certificate should not be cancelled or other penalties imposed for the abandonment and institution of services contrary to Pennsylvania law.

In September, 1969, Allegheny filed its complaint instituting Civil Action No. 69-2148 in the United States District Court for the Eastern District of Pennsylvania; to void the PUC's orders and rules to show cause, which are placed in issue by the complaint, on the grounds that they have been preempted by CAB regulation under the Federal Aviation Act of 1958 and that they create an undue burden on interstate commerce; and to enjoin the PUC from seeking to regulate Allegheny's intrastate service in the manner challenged in the complaint.

Allegheny made no effort to establish a factual record before the PUC or to seek relief in State court or even to exhaust its remedy before the Pennsylvania PUC with respect to the order of May 26, 1969 (465 F.2d at 239, Allegheny's Petition, App., p. 15a; 319 F. Supp. at 410, Allegheny's Petition, App., p. 4a).

The Pennsylvania PUC answered the complaint and, thereafter, it and Allegheny signed a stipulation of facts and each moved for summary judgment and filed supporting briefs.

The CAB filed an *amicus curiae* brief supporting the issuance of an injunction against the PUC. However, it carefully avoided taking a "position with respect to procedural issues or questions of judicial jurisdiction." (CAB Brief, p. 6).

The NARUC filed an *amicus curiae* brief supporting the position of the Pennsylvania PUC.

Following oral argument, the District Court entered an Order on November 10, 1970, dismissing the complaint primarily on the ground that Allegheny had not attempted to exhaust adequate State remedies (319 F. Supp. 407, Allegheny's Petition, App., p. 1a).

On July 21, 1972, the United States Court of Appeals for the Third Circuit, in an opinion written by Judge Rosenn, affirmed the Federal District Court's refusal to exercise jurisdiction in this case on the grounds of equitable abstention (465 F.2d 237, Allegheny's Petition, App., p. 13a).

In a Petition for Rehearing In Banc filed on August 4, 1972, Allegheny challenged the Court's application of the abstention doctrine in the instant case. The Petition for Rehearing In Banc was denied on September 13, 1972,

in an 8 to 1 decision with Judge Gibbons dissenting (Allegheny's Petition, App., p. 31a).

SUMMARY OF ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS PROPERLY AFFIRMED, ON THE GROUNDS OF EQUITABLE ABSTENTION, THE DISTRICT COURT'S DISMISSAL OF ALLEGHENY'S SUIT TO ENJOIN THE PENNSYLVANIA PUC FROM REQUIRING ALLEGHENY TO OBTAIN THE PENNSYLVANIA PUC'S APPROVAL PRIOR TO DISCONTINUING DIRECT SERVICE OVER AN INTRASTATE ROUTE FOR WHICH ALLEGHENY HAD PREVIOUSLY OBTAINED FROM THE PUC A CERTIFICATE OF PUBLIC CONVENIENCE.

In cases of this nature, there exists a well established principle of our Federal-State system of government which requires the exhaustion of State administrative and judicial processes prior to the exercise of jurisdiction by the Federal courts.

One of the leading cases is *Public Utilities Commission of the State of California v. United Air Lines, Inc.*, 346 U.S. 402, 98 L. Ed. 140, 74 S. Ct. 151 (1953), which involved the issue of whether the California PUC or the CAB has jurisdiction over the rates which United charges for transportation between California mainland points and Catalina Island. Since Catalina Island is part of California, the PUC claimed jurisdiction.

The then Civil Aeronautics Act gave the CAB authority over rates "between places in the same State of the United States through air space over any place outside thereof." United and the CAB both claimed that flights from the

mainland to Catalina (a distance of 30 miles) are over the "high seas" and therefore under the exclusive jurisdiction of the CAB.

A three judge Federal district court upheld the contentions of United and the CAB. 109 F. Supp. 13.

On appeal, this Court in a *per curiam* order "reversed on authority of *Public Service Commission v. Wycoff,*" 344 U.S. 237, 97 L. Ed. 291, 73 S. Ct. 236 (1952). The Supreme Court in effect held that neither declaratory nor injunctive relief should be granted to an air carrier in an action seeking to prevent, on the ground that the CAB has exclusive jurisdiction, a State PUC from exercising its claimed jurisdiction over rates charged by the carrier for transportation between points in the same State but over the high seas.

The *California PUC* case presents the strongest possible application of the exhaustion doctrine since it presented for decision a clear cut legal issue unencumbered by any unresolved question of fact. In contrast, the case *sub judice* should ultimately turn on a factual record being developed as to whether it is reasonable to require direct air service between Harrisburg and Williamsport.

In the *Wycoff* case, which is the one the Supreme Court placed sole reliance on in the *California PUC* case, a motor carrier sought in a Federal district court a declaratory judgment that its transportation of motion picture film and newsreels between points in Utah constituted an integral part of interstate commerce, and an injunction against the Utah Public Service Commission to prevent interference with such transportation over routes authorized by the Interstate Commerce Commission. The district court upheld the Utah Commission and the court of appeals reversed.

On appeal, this Court reversed on the basis that federal courts should not interfere with proceedings before State administrative agencies.

Pennsylvania law provides adequate remedies. The Pennsylvania PUC is empowered to adopt regulations and orders and "to rescind or modify any such regulations or orders." Public Utility Law, Sec. 902. See also Sec. 1007.

Accordingly, Allegheny may apply to the Pennsylvania PUC to have the penalty rescinded and its certificate amended to reflect only economically viable operations.

Judicial review of PUC orders is provided by Article XI of the Public Utility Law. The granting of supersedeas is authorized pending review. Sec. 1103.

The delay and expense, which will occur to Allegheny in the exhaustion of its well-defined State remedies, are of its own making. It *chose* to ignore these remedies in the face of a long line of cases applying the doctrine of abstention in Federal-State relations.

Moreover, the doctrine of abstention is more than a theoretical exercise in promoting comity between the Federal and State governments. It has a growing practical application today in conserving the time and energy of the Federal judiciary in its efforts to handle a rapidly growing case load. Why should the over-burdened Federal courts be called upon to expend valuable time in deciding a case of this nature which may easily be resolved by the PUC or the State courts?

Allegheny's Petition for a Writ of Certiorari, in substance, contends that the abstention doctrine does not apply to a case involving a Federal preemption question.

The distinction Allegheny attempts to draw in applying the abstention doctrine between a Federal preemption question and other Federal constitutional questions is a distinction without difference. The Federal preemption question involves construction of a Federal statute whereas a Federal constitutional question involves construction of a Federal constitutional provision. Both involve alleged conflicts with State statutes.

In addition, Allegheny ignores the most recent United States Supreme Court case applying the abstention doctrine. In *Lake Carriers' Assn. v. MacMullen,* 406 U.S. 498, 32 L. Ed. 2d 257, 40 U.S. Law Week 4569 (May 30, 1972), the United States Supreme Court held that abstention was proper in a case challenging the validity of the Michigan Watercraft Pollution Control Act. *Lake Carriers' Assn. v. MacMullen, supra,* 32 L. Ed. 2d at 264, 40 U.S. Law Week at 4571 (May 30, 1972) did involve a claim ". . . that the Michigan statute conflicts with or is pre-empted by federal law, primarily the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, and is therefore invalid under the Supremacy Clause."

Allegheny also ignores the case of *Public Utilities Commission of the State of California v. United Air Lines, Inc., supra.* This case also clearly involved a preemption claim. The case is extensively discussed in this brief, *supra.*

The cases relied upon by Allegheny in its Petition for a Writ of Certiorari did all hold "no abstention" in a given fact situation, but the instant case is distinguishable from these cases. The factors relied upon by Judge Rosenn were not present in those cases.

One of the principal factors relied upon by Judge Rosenn was the fact that Allegheny had on its own initiative sought

and obtained from the Pennsylvania PUC ". . . a certificate of public convenience as an *intrastate* carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport." (465 F.2d at 243, Allegheny's Petition, App., p. 24a.)

Clearly, a case such as the instant case, where the airline has sought and obtained a certificate of public convenience is distinguishable from cases where no such certificate was sought and obtained.

Additional factors relied upon by Judge Rosenn as requiring abstention were:

(1) The State's interests in local airline service are significant. Airports, runways, and related facilities often require large expenditures at considerable community sacrifice and effort. In addition, the communities involved may have come to depend on the direct air service, and there is a presumption under Pennsylvania law that certificated public utility service is needed and vital, until a public utility proves otherwise (465 F.2d at 244, Allegheny's Petition, App., p. 25a).

(2) Allegheny presented no evidence suggesting that it would have been harmed by having to resort to the Pennsylvania PUC or State courts before discontinuing the service (*Id.*).

(3) Reliance by local communities upon the services provided by Allegheny would be reasonable in light of the airline's action in obtaining from the Pennsylvania PUC a certificate to transport persons and property between points in Pennsylvania (465 F.2d at 244, 245, Allegheny's Petition, App., p. 26a).

(4) The danger of Federal-State friction is intensified by Allegheny's request for a perpetual injunction which would enjoin the Pennsylvania PUC from "*any action or proceeding* for any violation of the laws of . . . Pennsylvania based upon action by Allegheny in changing its patterns of service." If this relief were granted, the airline, while not being subject to State regulation, would maintain the benefits that accrue to holders of State public utility certificates (465 F.2d at 245, Allegheny's Petition, App., p. 27a).

(5) There are no ". . . significant federal concerns which would override the other factors mentioned above. Even if it should be ultimately determined that the state does not have power to regulate the actions which precipitated this suit, a temporary co-existence of federal-state regulation will not frustrate any immediate goals or policies of the Federal Aviation Act." (465 F.2d at 245, Allegheny's Petition, App., p. 28a.)

In addition to the factors relied upon by this Court there is another factor supporting equitable abstention. This factor is that the State law is unsettled in this case, and a determination by State courts may make a determination on the Federal preemption issue unnecessary.

II.

THE FEDERAL AVIATION ACT OF 1958 DOES NOT PREVENT PENNSYLVANIA FROM ADMINISTERING A REASONABLE REGULATORY PROGRAM TO PROTECT THE PUBLIC INTEREST OF TRAVELERS USING INTRASTATE AIR TRANSPORTATION.

Congress, in enacting the Federal Aviation Act of 1958, clearly did not intend to completely preempt the regulation

of air transportation. CAB domestic jurisdiction in the economic sense is primarily couched in terms of "interstate air commerce" and "interstate air transportation."

Obviously, this is not the language of total Federal preemption.

The Congressional propensity to divide the interstate and intrastate characteristics of a national industry, and to assign the former to Federal regulation and to reserve the latter for State regulation, is consistently reflected in the programs governing electric, gas, motor carrier, railroad and telephone companies.

The Federal Aviation Act is the latest offspring in this family of legislation and bears unmistakably the genetic qualities of Federal-State regulatory alliance.

We believe Congress was wise in permitting the formation of this Federal-State alliance because its proper functioning affords the American people the maximum benefits from air transportation. Obviously, a State agency, such as the Pennsylvania PUC, is far more concerned with the adequacy of air transportation among the smaller communities in the State than is the CAB. In contrast, the CAB is far more concerned with the adequacy of a national air transportation system than is any single State. In short, the two regulatory interests form a partnership, complementing each other in advancing the public welfare.

Out of interpretations of the above Federal statutes, and out of other incidents of our Federalism, has evolved a line of decisions defining the interface between Federal and State jurisdiction. *California v. Thompson*, 313 U.S. 109, 85 L. Ed. 1219 (1941); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963).

The test of whether both Federal and State regulations may operate or the State regulation must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives. Federal regulation of a field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all State regulation at the other end.

When a dispute arises over whether a given transaction is within the scope of Federal or State regulatory authority, the problem should not be approached negatively, thus raising the possibility that a "no man's land" will be created. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19, 5 L. Ed. 2d 377, 390, 81 S. Ct. 435 (1961).

In *People v. Western Air Lines, Inc.*, 42 Cal. 2d 261, 268 P. 2d 723 (1954), the court upheld the authority of the California Public Utilities Commission to regulate passenger rates for air coach service between Los Angeles and San Francisco. The court in construing the Civil Aeronautics Act of 1938, which is comparable to the Federal Aviation Act of 1958, held that "it seems clear that Congress has not sought to extend the economic regulation of the board (CAB) to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates." 268 P. 2d 736 (26). An appeal from this decision was dismissed by the United States Supreme Court "for want of a substantial Federal question." 348 U.S. 859, 99 L. Ed. 677, 75 S. Ct. 87 (1954).

The Supreme Court has also upheld the power of the States to tax the instrumentalities of airlines used in interstate commerce. *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 98 L. Ed. 967, 74 S. Ct. 757 (1954); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 88 L. Ed. 1283, 64 S. Ct. 950, 153 ALR 245 (1944).

As the Nation grows in population, the role of the State commissions in protecting the public interest in the local aspects of air transportation grows in importance. Obviously, the State is far more concerned than the CAB in seeing that local communities receive adequate intrastate air transportation to the extent economically feasible.

We readily admit national supremacy in air transportation and that the State role must not interfere with the accomplishment of national objectives as determined by the Federal Aviation Act.

We admit that the final determination of public need for air service must ultimately rest in its use by the traveling public.

We admit that an airline should be authorized to eliminate certain cities as intermediate points on a route where the cost of serving such points would be too great in relation to the small volume of traffic.

We merely contend that State commissions should continue to be entrusted with the making of initial decisions regarding matters of intrastate air transportation. The nature of Allegheny's Federal certificate in this case, which permits great freedom in abandoning routes within Pennsylvania, indicates that the CAB is only secondarily interested in intrastate service. This is understandable when we consider its immense duties involving interstate service.

If State regulation is ousted, public protection will be diminished. In the absence of Pennsylvania PUC regulation, Allegheny could easily decide to concentrate its equipment in serving the most remunerative segments and abandon other segments showing a lower margin of profit.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS PROPERLY AFFIRMED, ON THE GROUNDS OF EQUITABLE ABSTENTION, THE DISTRICT COURT'S DISMISSAL OF ALLEGHENY'S SUIT TO ENJOIN THE PENNSYLVANIA PUC FROM REQUIRING ALLEGHENY TO OBTAIN THE PENNSYLVANIA PUC'S APPROVAL PRIOR TO DISCONTINUING DIRECT SERVICE OVER AN INTRASTATE ROUTE FOR WHICH ALLEGHENY HAD PREVIOUSLY OBTAINED FROM THE PUC A CERTIFICATE OF PUBLIC CONVENIENCE.

In cases of this nature, there exists a well established principle of our Federal-State system of government which requires the exhaustion of State administrative and judicial processes prior to the exercise of jurisdiction by the Federal courts.

One of the leading cases is *Public Utilities Commission of the State of California v. United Air Lines, Inc.*, 346 U.S. 402, 98 L. Ed. 140, 74 S. Ct. 151 (1953), which involved the issue of whether the California PUC or the CAB has jurisdiction over the rates which United charges for transportation between California mainland points and Catalina Island. Since Catalina Island is part of California, the PUC claimed jurisdiction.

The then Civil Aeronautics Act, 52 Stat. 973, gave the CAB authority over rates "between places in the same

State of the United States through air space over any place outside thereof." United and the CAB both claimed that flights from the mainland to Catalina (a distance of 30 miles) are over the "high seas" and therefore under the exclusive jurisdiction of the CAB.

A three judge Federal district court upheld the contentions of United and the CAB. 109 F. Supp. 13.

On appeal, this Court in a *per curiam* order "reversed on authority of *Public Service Commission v. Wycoff*," 344 U.S. 237, 97 L. Ed. 291, 73 S. Ct. 236 (1952). The Supreme Court in effect held that neither declaratory nor injunctive relief should be granted to an air carrier in an action seeking to prevent, on the ground that the CAB has exclusive jurisdiction, a State PUC from exercising its claimed jurisdiction over rates charged by the carrier for transportation between points in the same State but over the high seas.

The California PUC case presents the strongest possible authority for application of the exhaustion doctrine since it presented for decision a clear cut legal issue unencumbered by any unresolved question of fact. In contrast, the case *sub judice* should ultimately turn on a factual record being developed as to whether it is reasonable to require direct air service between Harrisburg and Williamsport.

In the *Wycoff* case, which is the one this Court placed sole reliance on in the *California PUC* case, a motor carrier sought in a Federal district court a declaratory judgment that its transportation of motion picture film and newsreels between points in Utah constituted an integral part of interstate commerce, and an injunction against the Utah Public Service Commission to prevent interference with such transportation over routes authorized by the

Interstate Commerce Commission. The district court upheld the Utah Commission, the court of appeals reversed, and this Court granted certiorari.

In its opinion, this Court quickly decided the inappropriateness of injunctive relief and devoted the remainder of its opinion in reaching the same conclusion as to declaratory relief. The Court stated in part that [344 U.S. 246, 97 L. Ed. 297 (11)]:

> Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Eccles v. Peoples Bank*, 333 U.S. 426, 92 L. Ed. 784, 68 S. Ct. 641. See *Colegrove v. Green*, 328 U.S. 549, 90 L. Ed. 1432, 66 S. Ct. 1198. Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.
>
> But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it

is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

> The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341, 95 L. Ed. 1002, 71 S. Ct. 762 (1951), the railroad was denied authority by the Alabama PSC to discontinue passenger train service on the ground that there was a public need for the service although it was being operated at a loss. Alleging that irreparable loss would result from the continued operation of the service, the railroad sought and obtained an injunction from a three-judge Federal district court against the enforcement of Alabama law.

On appeal, this Court held that, although there was a basis for Federal jurisdiction, the exercise of such jurisdiction should, on considerations of comity, be withheld on the ground that the State law provided for review of the PSC's order in the State courts and for stay pending such review. This Court reasoned that [341 U.S. 345, 95 L. Ed. 1006(3)]:

> Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission. 49 U.S.C., Secs. 1, *et seq.* But, it has long been held that this interblending of the interstate and intrastate operations

does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U.S. 352, 57 L. Ed. 1511, 33 S. Ct. 729, 48 LRA NS 1151, Ann Cas 1916A 18 (1913). And Congress has since provided:

"That nothing in (the Interstate Commerce Act) shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the (Interstate Commerce Commission)." 49 U.S.C., Sec. 1(17)(a).

This Court has held that regulation of intrastate railroad service is "primarily the concern of the state." *North Carolina v. United States*, 325 U.S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer v. Massachusetts*, 308 U.S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service).

State and federal regulatory agencies have expressed concern over the chronic deficit arising out of passenger train operations as a threat to the financial security of the American railroads and have recommended drastic action to minimize the deficit including the discontinuance of unpatronized and unprofitable service. However, our concern in this case is limited to the propriety of a federal court injunction enjoining enforcement of a state regulatory order.

The court below justified the exercise of its jurisdiction with a finding that continued operation of trains Nos. 7 and 8 would result in confiscation of appellee's property in violation of the Due Process Clause of the Fourteenth Amendment. In pursuing the threshold inquiry whether a federal court should exercise jurisdiction in this case, we find it unnecessary to consider issues relating to the merits of appellee's case, issues which appellants did not see fit to raise in this Court either in their Statement of Jurisdiction or in their briefs. We do note that in passing upon similar contentions in the past, this Court has recognized that review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved when the return on the entire intrastate operations of a utility is drawn into question. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U.S. 1, 24-27, 51 L. Ed. 933, 944, 945, 27 S. Ct. 585, 11 Ann Cas 398 (1907). The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered. *Chesapeake & Ohio R. Co. v. Public Service Comm. of West Virginia*, 242 U.S. 603, 608, 61 L. Ed. 520, 523, 37 S. Ct. 234 (1917).

The Alabama Commission, after a hearing held in the area served, found a public need for the service. The court below, hearing evidence *de novo*, found that no public necessity exists in

view of the increased use and availability of motor transportation. We do not attempt to resolve these inconsistent findings of fact. We take note, however, of the fact that a federal court has been asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the public need for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and other Alabama communities directly affected.

Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, tit. 48, Sec. 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, *id.* Sec. 82, and its decision may be appealed to the Alabama Supreme Court. *Id.*, Sec. 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are "supervisory in character." *Avery Freight Lines, Inc. v. White*, 245 Ala. 618, 622, 623, 18 So2d 394, 398, 154 ALR 732 (1944). The Supreme Court of Alabama has held that it will review an order of the Commission as if appealed directly to it, *Alabama Public Service Com. v. Nunis*, 252 Ala. 30, 34, 39 So2d 409, 412 (1949), and that

judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted. *Alabama Public Service Com. v. Southern Bell Tel. & Tel. Co.*, 253 Ala. 1, 11, 12, 42 So2d 655, 662 (1949). . . . Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code, 1940, tit. 48, Secs. 81, 84. Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "(f)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with State policies," the usual rule of comity must govern the exercise of equitable jurisdiction by the

District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 577, 85 L. Ed. 358, 362, 61 S. Ct. 343 (1941); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021, as amended, 311 U.S. 614, 615, 85 L. Ed. 390, 391, 61 S. Ct. 66 (1940). . . .

As this Court held in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297, 298, 87 L. Ed. 1407, 1410, 1411, 63 S. Ct. 1070 (1943):

"This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer. . . .

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

The rationale of the *California PUC*, *Wycoff* and *Alabama PSC* cases is also reflected in: *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U.S. 802, 91 L. Ed. 1261, 67 S. Ct. 963; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 87 L. Ed. 424, 63 S. Ct. 339; *Macauley v. Waterman S. S. Corp.*, 327 U.S. 540, 90 L.

Ed. 839, 66 S. Ct. 712; *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; *Matthews v. Rodgers,* 284 U.S. 521, 525, 76 L. Ed. 447, 451, 52 S. Ct. 217 (1932); *Pennsylvania v. Williams,* 294 U.S. 176, 185, 79 L. Ed. 841, 847, 55 S. Ct. 380, 96 ALR 1166 (1935); *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 500, 85 L. Ed. 971, 974, 61 S. Ct. 643 (1941); *Natural Gas Pipeline Co. v. Slattery,* 302 U.S. 300, 82 L. Ed. 276, 281 (4, 5), 58 S. Ct. 199 (1937); *Atlas Life Ins. Co. v. W. I. Southern, Inc.,* 306 U.S. 563, 83 L. Ed. 987, 59 S. Ct. 657; *Shipman v. Du Pre,* 339 U.S. 321, 94 L. Ed. 877, 70 S. Ct. 640; *Watson v. Buck,* 313 U.S. 387, 85 L. Ed. 1416, 61 S. Ct. 962, 136 ALR 1426 (1941); *Chicago v. Fieldcrest Dairies,* 316 U.S. 168, 86 L. Ed. 1355, 62 S. Ct. 986; *A.F. of L. Metal Trades Dept. v. Watson,* 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761; *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 89 L. Ed. 101, 65 S. Ct. 152; *Illinois Commerce Commission v. Thomson,* 318 U.S. 675, 686, 87 L. Ed. 1075, 1082(5) (1943); *Gilchrist v. Interborough Rapid Transit Co.,* 279 U.S. 159, 208, 209, 73 L. Ed. 652, 664, 665, 49 S. Ct. 282 (1929); *Porter v. Investors Syndicate,* 286 U.S. 461, 76 L. Ed. 1226, 52 S. Ct. 617, 287 U.S. 346, 77 L. Ed. 354, 53 S. Ct. 132 (1931); *Central Kentucky Natural Gas Co. v. Railroad Commission,* 290 U.S. 264, 271, 78 L. Ed. 307, 312, 54 S. Ct. 154; *Di Giovanni v. Camden F. Ins. Asso.,* 296 U.S. 64, 80 L. Ed. 47, 56 S. Ct. 1; *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 84 L. Ed. 876, 60 S. Ct. 628; *Henderson Water Company v. Corporation Commission of the State of North Carolina,* 269 U.S. 278, 70 L. Ed. 273, 46 S. Ct. 112 (1925); *St. Louis-San Francisco Railway Company v. Alabama Public Service Commission,* 279 U.S. 560, 73 L. Ed. 843, 49 S. Ct. 383 (1929); *Lawrence v. St. Louis-San*

Francisco Railway Company, 274 U.S. 588, 71 L. Ed. 1219 (1927); *Machine Company v. State Corporation Commission of Virginia*, 236 U.S. 699, 59 L. Ed. 797 (1915); *Grand Trunk Railway Company of Canada v. Michigan Railroad Commission*, 231 U.S. 457, 58 L. Ed. 310, 34 S. Ct. 152 (1913).

Pennsylvania law provides adequate remedies.

The Pennsylvania PUC is empowered to adopt regulations and orders and "to rescind or modify any such regulations or orders." Public Utility Law, Sec. 902. See also Sec. 1007.

Accordingly, Allegheny may seek to have the penalty rescinded and its certificate amended to reflect only economically viable operations by applying to the Pennsylvania PUC.

Judicial review of PUC orders is provided by Article XI of the Public Utility Law. The granting of supersedeas is authorized pending review. Sec. 1103.

The delay and expense, which will occur to Allegheny in the exhaustion of its well-defined State remedies, are of its own making. It *chose* to ignore these remedies in the face of a long line of cases applying the doctrine of abstention in Federal-State relations.

Allegheny stands here in the awkward posture of the proverbial child who, having murdered his mother and father, begs the court for mercy on the ground that he is an orphan.

Allegheny's Petition for a Writ of Certiorari, in substance, contends that the abstention doctrine does not apply to a case involving a Federal preemption question.

The distinction Allegheny attempts to draw in applying the abstention doctrine between a Federal preemption question and other Federal constitutional questions is a distinction without a difference. The Federal preemption question involves construction of a Federal statute whereas a Federal constitutional question involves construction of a Federal constitutional provision. Both involve alleged conflicts with State statutes.

In addition, Allegheny ignores the most recent United States Supreme Court case applying the abstention doctrine. In *Lake Carriers' Assn. v. MacMullen,* 406 U.S. 498, 32 L. Ed. 2d 257, 40 U.S. Law Week 4569 (May 30, 1972), the United States Supreme Court held that abstention was proper in a case challenging the validity of the Michigan Watercraft Pollution Control Act. *Lake Carriers' Assn. v. MacMullen, supra,* 32 L. Ed. 2d at 264, 40 U.S. Law Week at 4571 (May 30, 1972) did involve a claim"... that the Michigan statute conflicts with or is pre-empted by federal law, primarily the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, and is therefore invalid under the Supremacy Clause."

Allegheny also ignores the case of *Public Utilities Commission of the State of California v. United Air Lines, Inc., supra.* This case also clearly involved a preemption claim. The case is extensively discussed in this brief, *supra.*

The cases relied upon by Allegheny in its Petition for a Writ of Certiorari are: *Capital Service, Inc. v. NLRB,* 347 U.S. 501, 98 L. Ed. 888 (1954); *Public Utilities Commission v. Gas Co.,* 317 U.S. 456, 87 L. Ed. 396 (1943); *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.,* 357 U.S. 77 (1958); *Chemical Specialties Manufacturers Assoc., Inc. v. Lowery,* 452 F.2d 431 (2d Cir. 1971). These cases did all hold "no abstention" in a given fact situation, but the instant case is distinguishable from these cases. The factors relied upon by Judge Rosenn were not present in these cases.

One of the principal factors relied upon by Judge Rosenn was the fact that Allegheny had on its own initiative sought and obtained from the Pennsylvania PUC ". . . a certificate of public convenience as an *intrastate* carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport." (465 F.2d at 243, Allegheny's Petition, App., p. 24a.) Judge Rosenn stated:

> Stripped of the efforts to drape this case with federal questions, the facts show that Allegheny, without any attempt on the part of the PUC to extend its regulatory powers over it, made a written application to the PUC for a certificate of public convenience as an intrastate carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport. The service it offered to provide was found by that Commission, after a hearing and an opportunity for affected parties to be heard, to be necessary to the public interest. A certificate of public convenience was granted and it is now held by Allegheny. Under the rules of the Commission, all or part of this service may be discontinued upon application by the carrier to the PUC and that agency's approval. Additionally, matters such as this which go to the jurisdiction of the PUC may be tested in special proceedings before the Pennsylvania Commonwealth Court. 66 P.S. 1441. The thrust of these Pennsylvania rules and laws is that, once certified, a carrier must test these issues before service is discontinued. (465 F.2d at 243, Allegheny's Petition, App., p. 24a.)

Clearly, a case such as the instant case, where the airline has sought and obtained a certificate of public convenience

is distinguishable from cases where no such certificate was sought and obtained.

Additional factors relied upon by Judge Rosenn as requiring abstention were:

(1) The State's interests in local airline service are significant. Airports, runways, and related facilities often require large expenditures at considerable community sacrifice and effort. In addition, the communities involved may have come to depend on the direct air service, and there is a presumption under Pennsylvania law that certificated public utility service is needed and vital, until a public utility proves otherwise (465 F.2d at 244, Allegheny's Petition, App., p. 25a).

(2) Allegheny presented no evidence suggesting that it would have been harmed by having to resort to the Pennsylvania PUC or State courts before discontinuing the service (*Id.*).

(3) Reliance by local communities upon the services provided by Allegheny would be reasonable in light of the airline's action in obtaining from the Pennsylvania PUC a certificate to transport persons and property between points in Pennsylvania (465 F.2d at 244, 245, Allegheny's Petition, App., p. 26a).

(4) The danger of Federal-State friction is intensified by Allegheny's request for a perpetual injunction which would enjoin the Pennsylvania PUC from "*any action or proceeding* for any violation of the laws of . . . Pennsylvania based upon action by Allegheny in changing its patterns of service." If this relief were granted, the airline, while not being subject to State regulation, would maintain the benefits that accrue to holders of State public

utility certificates (465 F.2d at 245, Allegheny's Petition, App., p. 27a).

(5) There are no "... significant federal concerns which would override the other factors mentioned above. Even if it should be ultimately determined that the state does not have power to regulate the actions which precipitated this suit, a temporary co-existence of federal-state regulation will not frustrate any immediate goals or policies of the Federal Aviation Act." (465 F.2d at 245, Allegheny's Petition, App., p. 28a.)

In addition to the factors relied upon by this Court there is another factor supporting equitable abstention. This factor is that the State law is unsettled in this case, and a determination by State courts may make a determination on the Federal preemption issue unnecessary. The NARUC is aware that the Court of Appeals in the instant case stated:

> In what was basically an alternative abstention holding, the district court noted that "the dispute involves an unsettled question of state law, i.e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier." *Allegheny Airlines, Inc. v. PUC*, 319 F. Supp. 407, 413 (E.D. Pa. 1970). Since we find that the district court was correct in abstaining for the primary reasons it developed, *we find it unnecessary to decide* whether it correctly concluded there existed unclear state law. We *note*, however, that in our view, the PUC's authority to take the measures described above *seems* clear. 66 P.S. Sec. 1122. (465 F.2d at 242, n. 3, Allegheny's Petition, pp. 21a & 22a, n. 3). (Emphasis supplied.)

The NARUC asserts that the State law is unsettled. The Statute, 66 Pa. Code, Sec. 1122(b) provides:

> Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:
>
> * * *
>
> (b) For any public utility to abandon or surrender, in whole or in part, any service: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron.

The Pennsylvania courts have never passed upon the construction of this Statute as it relates to intrastate air transportation. As was stated by the District Court:

> Second, the dispute involves an unsettled question of state law, i.e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier. The parties have cited no Pennsylvania authorities defining the limits of the PUC's authority over rights granted to such carriers. Until the state courts speak to the question we cannot know whether they will interpret the PUC's authority under the state act narrowly or broadly. In making their determination as to the scope of the PUC's authority, the state courts are bound, just as the federal courts are, to interpret and apply the federal Constitution

> and laws and all of the arguments which Allegheny has sought to raise here under the interstate commerce and supremacy clauses of the federal Constitution must be given full consideration by the state courts. . . . (319 F. Supp. at 413, Allegheny's Petition, App. pp. 10a & 11a).

Certainly, the Pennsylvania courts should be permitted to interpret the statute prior to a Federal court's ruling on the preemption question. This was made clear by this Court in *Lake Carriers' Assn. v. MacMullen, supra,* 32 L. Ed. 2d at 270, 40 U.S. Law Week at 4573, as follows:

> We do not know, of course, how far Michigan courts will go in interpreting the requirements of the state Watercraft Pollution Control Act in light of the federal Water Quality Improvement Act and the constraints of the United States Constitution. But we are satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly modify the federal questions appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations that we have found compelling in prior decisions. See, *e.g., Harman v. Forssenius, supra,* at 537, 14 L. Ed. 2d at 56; *Baggett v. Bullitt,* 377 U.S. 360, 378-379, 12 L. Ed. 2d 377, 389, 84 S. Ct. 1316 (1964).

Accordingly, the United States Court of Appeals properly affirmed, on the grounds of equitable abstention, the Federal District Court's dismissal of Allegheny's suit.

II.

THE FEDERAL AVIATION ACT OF 1958 DOES NOT PREVENT PENNSYLVANIA FROM ADMINISTERING A REASONABLE REGULATORY PROGRAM TO PROTECT THE PUBLIC INTEREST OF TRAVELERS USING INTRASTATE AIR TRANSPORTATION.

Allegheny asserts that, "For the purpose of judging the propriety of abstention in this case, it must be assumed that Congress intended to preempt state regulation of scheduling by a federally certificated air carrier." (Allegheny's Petition, p. 6.) No authority is cited for this assertion and there is no authority for this assertion. Clearly no such assumption can be made in the present case.

In addition, Allegheny asserts that ". . . there is a direct conflict in federal and state regulatory authority." (Allegheny's Petition, p. 10.) This assertion is contrary to the findings of the Court of Appeals (465 F.2d at 245, Allegheny's Petition, App., pp. 27a and 28a) and is not supported by the facts of this case.

Congress, in enacting the Federal Aviation Act of 1958 (49 U.S.C.A., Sec. 1301 *et seq.*), clearly did not intend to completely preempt the regulation of air transportation. CAB domestic jurisdiction in the economic sense is primarily couched in terms of "interstate air commerce" and "interstate air transportation."[1] Moreover, the CAB is

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[1]49 U.S.C.A., Sec. 1301 (20), defining "interstate air commerce," and 49 U.S.C.A., Sec. 1301 (21), defining "interstate air transportation," tie the definitions to the crossing of a State line. The definitions of "air transportation" [Sec. 1301(10)] and of "air commerce [Sec. 1301(4)] are both tied to interstate movement and the transportation of mail, and the latter goes further to include operations "within the limits of any Federal airway" or "which directly

(Continued)

expressly "empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this act within its jurisdiction. . . ." 49 U.S.C.A., Sec. 1324(b)

Obviously, this is not the language of total Federal preemption.

The Congressional propensity to divide the interstate and intrastate characteristics of a national industry, and to assign the former to Federal regulation and to reserve the latter for State regulation, is consistently reflected in many other areas. More specifically, this regulatory dichotomy is applied to electric companies under the Federal Power Act,[2] to gas companies under the Natural Gas Act,[3] to railroads and motor carriers under the Interstate Commerce

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[1](Cont'd) affects, or which may endanger safety in, interstate... commerce." These definitions assume jurisdictional significance in Sections 1302, 1371, 1373 and 1374 of 49 U.S.C.A., which concern matters of "public interest," certificates of public convenience and necessity, tariffs, and rates, respectively.

[2]16 U.S.C.A., Sec. 791, *et seq.*, with particular reference to Secs. 824(b)(c), 824a(f), 824c(f), and 824h. In general, the Federal Power Commission regulates wholesale rates and related facilities and service, and the State commissions regulate retail rates and related facilities and service.

[3]15 U.S.C.A., Sec. 717, *et seq.*, with particular reference to Secs. 717(b)(c), 717a(6,7), and 717p. In general, the Federal Power Commission regulates "interstate" wholesale rates and related facilities and service, and the State commissions regulate "intrastate" wholesale and all retail rates and related facilities and service. See also Secs. 3, 4 and 5 of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C.A., Secs. 1672-1674) which apply an analogous regulatory split to the national gas safety program.

Act,[4] and to telephone and telegraph companies under the Communications Act.[5]

The Federal Aviation Act is the latest offspring in this family of legislation and bears unmistakably the genetic qualities of Federal-State regulatory alliance.

Legislative intent is further reflected by the failure of Congress to enact bills proposing to extend Federal economic regulation to include intrastate operations of air carriers.[6]

We believe Congress was wise in permitting the formation of this Federal-State alliance because its proper functioning affords the American people the maximum benefits

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[4]49 U.S.C.A., Sec. 1, *et seq.*, with particular reference to Secs. 1(2), 1(17)(a), 1(22), 13(2)(3), 13a(2), 302(a)(b), 303(10)(20), and 305. In general, the State commissions regulate the intrastate business of railroads and motor carriers. See also Secs. 205 and 206 of the Federal Railroad Safety Act of 1970 (Public Law 91-458) which permits a State: to adopt more stringent safety regulations than the Federal safety regulations "when necessary to eliminate or reduce an essentially local safety hazard" created by interstate railroad operations; and to otherwise conduct a comprehensive safety program covering substantially all interstate railroad operations within the State.

[5]47 U.S.C.A., Sec. 151 *et seq.*, with particular reference to Secs. 152, 153(e)(h), 214(a)(1-3), 221(b) and 410. The Federal Communications Commission regulates interstate message toll calls and local exchange calls even in instances where the boundaries of the exchange area overlap State lines.

[6]78th Congress, S. 246, H.R. 1012, H.R. 3420, H.R. 4845, H.R. 4848; 79th Congress, S. 541, H.R. 674, H.R. 3383; 80th Congress, H.R. 2337; 81st Congress, S. 423, S. 445, S. 2435. See also: 1944 NARUC Annual Convention Proceedings 221; 1945 *id.* 299; 1946 *id.* 210; 1947 *id.* 128; 1948 *id.* 69; 1949 *id.* 166; 1950 *id.* 106.

from air transportation. Obviously, a State agency, such as the Pennsylvania PUC, is far more concerned with the adequacy of air transportation among the smaller communities in the State than is the CAB. In contrast, the CAB is far more concerned with the adequacy of a national air transportation system than is any one State. In short, the two regulatory interests form a partnership complementing each other in advancing the public welfare.

Out of interpretations of the above Federal statutes, and out of other incidents of our Federalism, has evolved a line of decisions defining the interface between Federal and State jurisdiction.

In *California v. Thompson*, 313 U.S. 109, 85 L. Ed. 1219 (1941), this Court held that a State license statute regulating transportation agents engaged in negotiating for the transportation of passengers in motor vehicles is not, as applied to interstate passengers, a violation of the Commerce Clause where the Congress has not, either in the Federal Motor Carrier Act or otherwise, undertaken to exercise its power of regulation over such interstate activities.

A unanimous Court, speaking through Justice Harlan Fiske Stone, outlined the broad limits of permissible State action under the Commerce Clause in the following terms (313 U.S. 113, 2d par., 85 L. Ed. 2d 1221 (2)):

> As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet

(US) 245, 7 L. Ed. 412, and *Cooley v. Port Wardens,* 12 How (US) 299, 13 L. Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope of local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Not withstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo v. Pennsylvania, supra* (273 U.S. 40, 71 L. Ed. 528, 47 S. Ct. 267).

A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith v. Alabama,* 124 U.S. 465, 31 L. Ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co. v. Alabama,* 128 U.S. 96, 32 L. Ed. 352, 9 S. Ct. 28, 2 Inters. Com. Rep. 238. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co. v. Arkansas,* 219 U.S. 453, 55 L. Ed. 290, 31 S. Ct. 275; *Missouri P. R. Co. v. Norwood,* 283 U.S. 249, 75 L. Ed. 1010, 51 S. Ct. 458, 30 NCCA 639, and prescribe regulations

for payment of their wages. *Erie R. Co. v. Williams,* 233 U.S. 685, 58 L. Ed. 1155, 34 S. Ct. 761, 51 LRA (NS) 1097. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. & H. R. Co. v. New York,* 165 U.S. 628, 41 L. Ed. 853, 16 S. Ct. 418. It may limit the speed of interstate trains within city limits. *Erb v. Morasch,* 177 U.S. 584, 44 L. Ed. 897, 20 S. Ct. 819. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co. v. Public Utility Comrs.,* 254 U.S. 394, 409, 412, 65 L. Ed. 322, 333, 334, 41 S. Ct. 169, PUR1921C 143. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans L. & T. R. & S. S. Co. v. Louisiana,* 118 U.S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health,* 186 U.S. 380, 46 L. Ed. 1209, 22 S. Ct. 811. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson v. Black Bird Creek Marsh Co.,* 2 Pet. (U.S.) 245, 7 L. Ed. 412, *supra;* see *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 267, 80 L. Ed. 215, 219, 56 S. Ct. 194. It may regulate pilots and pilotage in its harbors. *Cooley v. Port Wardens,* 12 How. (U.S.) 299, 13 L. Ed. 996, *supra.* Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations applicable to articles of interstate commerce designed to safeguard the

inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce. *Turner v. Maryland,* 107 U.S. 38, 27 L. Ed. 370, 2 S. Ct. 44; *Plumley v. Massachusetts,* 155 U.S. 461, 39 L. Ed. 223, 15 S. Ct. 154, 5 Inters. Com. Rep. 590; *Patapsco Guano Co. v. Board of Agriculture,* 171 U.S. 345, 357, 358, 43 L. Ed. 191, 195-6, 18 S. Ct. 862; *Savage v. Jones,* 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715; see also *Minnesota Rate Cases (Simpson v. Shepard),* 230 U.S. 352, 398, 412, 57 L. Ed. 1511, 1540, 1547, 33 S. Ct. 729, 48 LRA (NS) 1151, Ann. Cas. 1916A 18, and cases cited; *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 185, 191, 82 L. Ed. 734, 738, 742, 58 S. Ct. 510, and cases cited. . . .

. . . It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and convenient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce. *Continental Baking Co. v. Woodring,* 286 U.S. 352, 371, 76 L. Ed. 1155, 1166, 52 S. Ct. 595, 81 ALR 1402; *Bradley v. Public Utilities Commission,* 289 U.S. 92, 95, 77 L. Ed. 1053, 1056, 53 S. Ct. 577, 85 ALR 1131; see *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510, *supra,* and cases cited; *H. P. Welch Co. v. New Hampshire,* 306 U.S. 79, 83,

83 L. Ed. 500, 504, 59 S. Ct. 438; *Eichholz v. Public Serv. Commission*, 306 U.S. 268, 83 L. Ed. 641, 59 S. Ct. 532; *Maurer v. Hamilton*, 309 U.S. 598, 603, 84 L. Ed. 969, 974, 60 S. Ct. 726; and see *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 84 L. Ed. 128, 60 S. Ct. 163.

If there is authority in the state, in the exercise of its police power, to adopt such regulations affecting interstate transportation, it must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of local concern which are in other respects within state regulatory power, and where the regulation does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern. See *Hartford Acci. & Indem. Co. v. Illinois*, 298 U.S. 155, 80 L. Ed. 1099, 56 S. Ct. 685.

This Court held in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190, that neither the Natural Gas Act, nor the Commerce Clause of its own force, precluded State regulation of rates for natural gas sold by an interstate pipeline to local consumers. See also: *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 64 L. Ed. 434, 40 S. Ct. 279 (1920).

In *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U.S. 179, 95 L. Ed. 190 (1950), which upheld an order of the Oklahoma State Corporation Commission fixing the minimum well-head price on gas entering interstate commerce, a unanimous Court observed that:

The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley v. Port Wardens* (U.S.) 12 How. 299, 13 L. Ed. 996 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker v. Brown,* 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346, 83 L. Ed. 752, 59 S. Ct. 528 (1939); *South Carolina Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510 (1938). The only requirements consistently recognized have been that the regulation does not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept. v. Barnwell Bros.,* (U.S.), *supra.* Compare *Leisy v. Hardin,* 135 U.S. 100, 34 L. Ed. 128 (1890), decided prior to the Wilson Act (Aug. 8, 1890) 26 Stat. 313, ch. 728, with *Re Rahrer (Wilkerson v. Rahrer),* 140 U.S. 545, 35 L. Ed. 572, 11 S. Ct. 865 (1891), decided thereafter.

One of the leading cases in the field is *Head v. New Mexico Board of Examiners in Optometry* (1963) 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759. This case involved a New Mexico statute which prohibits advertising by the quotation of prices or terms for the sale of eyeglasses. Acting under the statute, a trial court enjoined a newspaper and a radio station in Hobbs, New Mexico, serving an area much of which lies in Texas, from accepting, publishing or broadcasting a Texas optometrist's advertising which violated the New Mexico statute.

The New Mexico Supreme Court affirmed the lower court's order on the grounds that the injunction did not unlawfully burden interstate commerce and that the State's jurisdiction has not been ousted by Federal legislation. 70 NM 90, 370 P2d 811.

On appeal, this Court affirmed. In an opinion by Justice Stewart, expressing the views of himself, Chief Justice Warren and Justices Black, Clark, Harlan, White and Goldberg, it was held that (1) the statutory prohibition of eyeglass price advertising does not impose a constitutionally prohibited burden on interstate commerce, (2) the FCC's jurisdiction to regulate radio advertising does not preempt New Mexico's authority to prescribe eyeglass price advertising by radio, and (3) the New Mexico statute does not violate the due process or privileges and immunities clauses of the Fourteenth Amendment.

Justice Brennan wrote a concurring opinion reaching the same conclusion as the majority. Justice Douglas concurred in the result.

The radio station contended that the New Mexico statute constituted an undue burden on interstate commerce and that the regulation of advertising by radio has been

preempted by the Communications Act of 1934. The majority opinion responded to these contentions by stating that (374 U.S. 427, 10 L. Ed. 2d 987):

I

Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce. As we said in *Huron Portland Cement v. Detroit*, 362 US 440, 4 L. Ed. 2d 852, 80 S. Ct. 813, 78 ALR2d 1294, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: "In determining whether the State has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' *Sherlock v. Alling*, 93 U.S. 99, 103; *Austin v. Tennessee*, 179 U.S. 343; *Louisville & Nashville R. Co. v. Kentucky*, 183 U.S. 503; *The Minnesota Rate Cases*, 230 U.S. 352; *Boston & Maine R. Co. v. Armburg*, 285 U.S. 234; *Collins v. American Bus Lines, Inc.*, 350 U.S. 528." 362 U.S., at 443, 444.

Like the smoke abatement ordinance in the *Huron* case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of State legislation in this precise area has been expressly established. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461. A State law may not be struck down on the mere showing that its administration affects interstate commerce in some way. "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co v. Detroit, supra* (362 U.S. at 448).

It has not been suggested that the statute, applicable alike to "any person" within the State of New Mexico, discriminates against interstate commerce as such. Nor can we find that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation. The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any. *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*, 372 U.S. 714, 10 L. Ed. 2d 84, 83 S. Ct. 1022. We hold that the New Mexico statutes as applied here to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce.

II

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of Federal regulation under the Federal Communications Act. "The 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case.' Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 336 U.S. 725, 93 L. Ed. 1005, 1010, 69 S. Ct. 841. *Kelly v. Washington*, 302 U.S. 1, 10-13, 82 L. Ed. 3, 10, 12, 58 S. Ct. 87. In areas of the law not inherently requiring national uniformity, out decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, (or) evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256, 83 S. Ct. 1210. . . .

Finally, there has been no showing of any conflict between this State law and the Federal regulatory system, or that the State law stands as an obstacle to the full effectiveness of the Federal

> statute. No specific Federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed State regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it. As in *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*, 372 U.S. 714, at 724, 10 L. Ed. 2d 84, 91, 83 S. Ct. 1022, we are satisfied that the State statute "at least so long as any power the (Commission) may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the Federal legislation."

The test of whether both Federal and State regulations may operate or the State regulation must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives. Federal regulation of a field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons, either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all State regulation at the other end. *Florida Lime and Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142, 2d par, 145, 10 L. Ed. 2d 248, 256, r. col., last par., 258, r. col, 83 S. Ct. 1210, reh. den. 374 U.S. 858, 10 L. Ed. 2d 1082, 83 S. Ct. 1861. See also: *The Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.* (1963) 372 U.S. 714, 10 L. Ed. 2d 84, 83 S. Ct. 1022; *Huron Portland Cement Company v. Detroit* (1960), 362 U.S. 440, 4 L. Ed. 2d 852,

80 S. Ct. 813; *Schwartz v. Texas* (1952), 344 U.S. 199, 97 L. Ed. 231, 73 S. Ct. 232; *Cities Service Gas Company v. Peerless Oil & Gas Co.* (1950), 340 U.S. 179, 95 L. Ed. 190, 71 S. Ct. 215; *California v. Zook* (1949), 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841, reh den. 337 U.S. 921, 93 L. Ed. 1729, 69 S. Ct. 1152; *Southern Pacific Company v. Arizona* (1945), 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515; *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820; *Maurer v. Hamilton* (1940), 309 U.S. 598, 84 L. Ed. 969, 60 S. Ct. 726, 135 ALR 1347; *H. P. Welch Company v. New Hampshire* (1939), 83 L. Ed. 500, 59 S. Ct. 438; *Kelly v. Washington* (1937), 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87; *Gilvary v. Cuyahoga Valley Railway Company* (1934), 292 U.S. 57, 78 L. Ed. 1123, 54 S. Ct. 573; *Mintz v. Baldwin* (1933), 289 U.S. 346, 77 L. Ed. 1245, 53 S. Ct. 611; *Atchison, Topeka, & Santa Fe Railway Company v. Railroad Commission of the State of California* (1931), 283 U.S. 380, 75 L. Ed. 1128, 51 S. Ct. 553; and *Sinnot v. Davenport* (1859), 22 How. (U.S.) 227, 16 L. Ed. 243.

An act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several States to enact regulations covering other aspects of the subject[7] or merely supplement the Federal legislation in respect to local conditions.[8] Congressional regulation of a business or

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[7] *Dickinson v. Stiles* (1918), 246 U.S. 631, 62 L. Ed. 908, 38 S. Ct. 415; *Savage v. Jones* (1912), 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715; *Re Squires*, 114 Vt. 285, 44 A 2d 133, 161 ALR 349.

[8] *Huron Portland Cement Company v. Detroit* (1960), 362 U.S. 440, 4 L. Ed. 2d 852, 80 S. Ct. 813, 79 ALR 2d 1294.

activity does not nullify State regulation of the same business or activity if the Federal act does not cover the same field or is consistent with the State legislation, or if Congress has seen fit to only partially regulate the subject, since Congress has undoubted power to define the distribution of power over interstate commerce. Compare *Buck v. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502, reh. den. 343 U.S. 932, 96 L. Ed. 1341, 72 S. Ct. 756; *Hartford Accident & Indemnity Company v. Illinois* (1936) 298 U.S. 155, 80 L. Ed. 1099, 56 S. Ct. 685; *Missouri Pacific Railroad Company v. Norwood* (1931), 283 U.S. 249, 75 L. Ed. 1010, 51 S. Ct. 458.

Where the subject matter upon which the power is to be exercised is local and limited in its nature or sphere of operations, the rule is well established that the several States may prescribe regulations until Congress intervenes.[9] This is clearly the case where the regulations which should govern may in many respects be different in different localities and for that reason better understood and more wisely established by the local authorities.[10]

When a dispute arises over whether a given transaction is within the scope of Federal or State regulatory authority, the problem should not be approached negatively, thus raising the possibility that a "no man's land" will be created. *FPC v. Transcontinental Gas Pipe Line Corp.* (1961), 365 U.S. 1, at p. 19, 5 L. Ed. 2d 377, at p. 390, 81 S. Ct. 435.

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[9]*Halter v. Nebraska* (1907) 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419, aff'g. 74 Neb. 757, 105 NW 298.

[10]*Morgan's Louisiana and Texas Railroad and Steamship Company v. Board of Health* (1886), 118 U.S. 455, 30 L. Ed. 237, 6 S. Ct. 1114.

In *People v. Western Air Lines, Inc.*, 42 Cal. 2d 261, 268 P. 2d 723 (1954), the court upheld the authority of the California Public Utilities Commission to regulate passenger rates for air coach service between Los Angeles and San Francisco. The court in construing the Civil Aeronautics Act of 1938, which is comparable to the Federal Aviation Act of 1958, held that "it seems clear that Congress has not sought to extend the economic regulation of the board (CAB) to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates." 268 P. 2d 736 (26). An appeal from this decision was dismissed by this Court "for the want of a substantial Federal question." 348 U.S. 859, 99 L. Ed. 677, 75 S. Ct. 87 (1954). See also *United Air Lines, Inc. v. Public Utilities Commission of the State of California*, 342 U.S. 908, 96 L. Ed. 679, 72 S. Ct. 304 (1952).

This Court has also upheld the power of the States to tax the instrumentalities of airlines used in interstate commerce. *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 98 L. Ed. 967, 74 S. Ct. 757 (1954); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 88 L. Ed. 1283, 64 S. Ct. 950, 153 ALR 245 (1944).

As the Nation grows in population, the role of the State commissions in protecting the public interest in the local aspects of air transportation grows in importance. Obviously, the State is far more concerned than the CAB in seeing that local communities receive adequate intrastate air transportation to the extent economically feasible.

We readily admit national supremacy in air transportation and that the State role must not interfere with the accomplishment of national objectives as determined by the Federal Aviation Act.

We admit that the final determination of public need for air service must ultimately rest in its use by the traveling public.

We admit that an airline should be authorized to eliminate certain cities as intermediate points on a route where the cost of serving such points would be too great in relation to the small volume of traffic.

We merely contend that State commissions should continue to be entrusted with the making of initial decisions regarding matters of intrastate air transportation. The nature of Allegheny's Federal certificate in this case, which permits great freedom in abandoning routes within Pennsylvania, indicates that the CAB is only secondarily interested in intrastate service. This is understandable when we consider its immense duties involving interstate service.

If State regulation is ousted, public protection will be diminished. In the absence of PUC regulation, Allegheny could easily decide to concentrate its equipment in serving the most remunerative segments and abandon other segments showing a lower margin of profit.

Moreover, a similar argument to avoid loss of profits—under the guise of the need for ubiquitous Federal regulation of air transportation—was recently made by CAB certificated interstate airlines, serving intrastate segments in Texas, in an effort to prevent competition from a Texas certificated airline over the same intrastate segments. The Texas Supreme Court affirmed the grant of the Texas certificate in *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W. 2d 199, and, on appeal, the United States Supreme Court denied review. 27 L. Ed. 2d 247, 91 S. Ct. 244 (Dec. 7, 1970).

CONCLUSION

For the foregoing reasons, the NARUC submits that Allegheny's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied since the decision is clearly in accord with prior precedents of this Court.

Respectfully submitted,

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